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ALEXANDER L. STEVENS,

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1982

TRANS WORLD AIRLINES, INC.,

Petitioner,

v.

FRANKLIN MINT CORPORATION, FRANKLIN
MINT LIMITED, AND MCGREGOR, SWIRE
AIR SERVICES LIMITED,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Whether the courts of the United States may abrogate a provision of a treaty which is both constitutionally sound and capable of enforcement?

2. Whether the court of appeals erroneously failed to exercise its constitutional responsibility to construe the Warsaw Convention's limitation of liability provisions to effectuate the intent of the signatory States in light of changed circumstances?

3. What is the proper conversion factor for the gold franc provisions of the Warsaw Convention in view of the unequivocal intent of the Convention's signatories to fix air carrier limits of liability at a predictable, stable and definite level?

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AND MCGREGOR, SWIRE AIR SERVICES LIMITED,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, Trans World Airlines, Inc. ("TWA")¹ requests that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this action on September 28, 1982, which affirmed a final judgment of the United States District Court for the Southern District of New York. Specifically, TWA seeks review of that portion of the lower court's decision declaring that certain provisions of a treaty adhered to by the United States are prospectively unenforceable in United States courts.

1. Pursuant to Rule 28.1 of this Court, petitioner states that TWA is a wholly owned subsidiary of Trans World Corporation.

OPINIONS BELOW

The opinion of the court of appeals, reported at 690 F.2d 303 (2d Cir. 1982), is reprinted in the Appendix hereto at A-1.² The opinion of the district court, reported at 525 F. Supp. 1288 (S.D.N.Y. 1981), is reprinted at A-26.

JURISDICTION

Respondents, Franklin Mint Corporation, Franklin Mint Limited, and McGregor, Swire Air Services Limited (hereinafter collectively "Franklin Mint"), brought this action in the United States District Court for the Southern District of New York, alleging both federal question and diversity jurisdiction. Franklin Mint sought recovery for the loss of air cargo shipped on a TWA international flight and TWA moved for partial summary judgment to limit its liability under Article 22 of the Warsaw Convention.³ The district court granted TWA's motion and entered final judgment limiting TWA's liability in accordance with the Convention. Although the Court of Appeals for the Second Circuit affirmed the district court's decision, it declared that sixty days from the issuance of its mandate "the Convention's limits on liability for loss of cargo [will be] unenforceable in United States Courts." A-19, 690 F.2d at 311.⁴

This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254(1), which permits "any party" to a case in the court of appeals to apply for a writ of certiorari. It is clear that Section 1254(1)'s "reference to 'any party' is broad enough to encompass

2. References in the form "A" refer to pages of the Appendix to this petition.

3. All references to the "Warsaw Convention" or the "Convention" are to the Convention for the Unification of Certain Rules Relating to International Transportation by Air, October 12, 1929, 49 Stat. 3000, T.S. No. 876, 137 L.N.T.S. 11, *reprinted in* 49 U.S.C. §1502 note (1970).

4. The court of appeals denied TWA's petition for rehearing in banc on December 1, 1982 (A-24), and on December 17, 1982, stayed the issuance of its mandate subject to the filing of a petition for certiorari in this Court within thirty days of the entry of its stay order (A-21). This petition was filed within thirty days from that date.

the successful or winning party before the court of appeals." R. Stern & E. Gressman, *Supreme Court Practice* 58 (5th ed. 1978).

While TWA was technically victorious in the court below, the court of appeals totally abrogated, albeit prospectively, the limitation of liability provisions of the Warsaw Convention upon which TWA's "victory" was based. Since the abrogation of those limits will substantially increase TWA's operating costs as well as those of virtually all international air carriers and air freight shippers alike, there can be absolutely no doubt that the court of appeals decision has severely and adversely affected TWA. Accordingly, a grant of certiorari is proper in this case.⁵ Were this Court to consider review improper in this situation, it would preclude petitions for certiorari in a class of cases which may well be among the most appropriate for review—cases which announce such a substantial change in the law, and have such a broad impact, that the court below feels compelled to make its holding prospective only.

CONSTITUTIONAL PROVISIONS, TREATY INVOLVED

The constitutional and treaty provisions involved are Article II, Section 2, Clause 2 of the United States Constitution and Article 22 of the Warsaw Convention, which are set out at pages A-34 and A-35, respectively.

5. Indeed, in cases in which a court of appeals decision has adversely impacted non-parties, this Court has permitted intervention solely for the purpose of filing a petition for certiorari. See, e.g., *Banks v. Chicago Grain Trimmers*, 389 U.S. 813 (1967), 390 U.S. 459 (1968); *Hunter v. Ohio ex rel. Miller* 396 U.S. 879 (1967); *Rogers v. Paul*, 382 U.S. 198 (1965); see also *Mullaney v. Andersen*, 342 U.S. 415 (1952). Surely where an actual party to the action has suffered devastating consequences as a result of the decision of the court below, that party should not be barred from seeking Supreme Court review merely because the court of appeals chose to make its adverse ruling prospective in nature.

STATEMENT OF THE CASE

A. Introduction

This action arises out of the loss, during a TWA flight, of four packages of numismatic materials allegedly valued at \$250,000. The facts are undisputed. The numismatic materials in question were delivered in unmarked packages by Franklin Mint to TWA for shipment by air from the United States to England. Franklin Mint made no special declaration of value at the time the packages were delivered to TWA.⁶ The shipment never reached its destination.

B. The Warsaw Convention

The Warsaw Convention was signed at Warsaw, Poland in 1929, and adhered to by the United States in 1934.⁷ Since the Convention "is by far the most widely adopted treaty concerning private international law and after the United Nations Charter one of the most widely adopted of all treaties" (A. Lowenfeld, *Aviation Law* § 4.1, at 7-98 (2d ed. 1981)), its significance to the aviation industry as well as its importance within the multilateral treaty system is beyond dispute.

The primary purposes of the Convention are: (i) "to establish a uniform body of world-wide liability rules to govern international

6. Franklin Mint was not required to accept the limits of liability contained in the Convention. Pursuant to Article 22 of the Convention, Franklin Mint had the right to make a special declaration of value and pay an additional charge for full coverage. It chose, however, not to do so. As an experienced shipper of air freight, Franklin Mint presumably decided to protect against the risk of loss through its own insurance.

7. There have been four subsequent modifications of the Warsaw Convention: (i) Hague Protocol of 1955; (ii) the Montreal Agreement of 1966, a private agreement among most international air carriers; (iii) the Guatemala City Protocol of 1971; and (iv) the Montreal Protocols of 1976. Although neither Hague Protocol nor the Guatemala City Protocol has been ratified by the United States, both Protocols have been looked to as indicia of the signatories' subsequent conduct for purposes of construing provisions of the Convention. See, e.g., *Day v. Trans World Airlines, Inc.*, 528 F.2d 31, 36 n.15 (2d Cir. 1975), cert. denied, 429 U.S. 890 (1976). Obviously the signatories' most recent word on Article 22—the Montreal Protocols—is equally relevant in ascertaining their intent.

aviation, which would supersede . . . the scores of differing domestic laws" (*Reed v. Wiser*, 555 F.2d 1079, 1090 (2d Cir.), *cert. denied*, 434 U.S. 922 (1977)); (ii) to limit the maximum extent of a carrier's potential liability for damages (*see Lowenfeld & Mendelsohn, The United States and the Warsaw Convention*, 80 Harv. L. Rev. 497, 499-500 (1967)); and (iii) to set a "reliable and consistent basis for recovery for injury or damage to persons or property" (J. Golden, Warsaw Convention Liability Limits (May 20, 1981) (unpublished memorandum by the Director of the Bureau of Compliance and Consumer Protection, Civil Aeronautics Board) [hereinafter cited as Golden Memorandum] (reprinted at A-86)).

In order to ensure that the Warsaw limits of liability would remain uniform and stable, the drafters of the Convention expressed the limitation in terms of the then existing international monetary unit of account, gold.⁸ From the inception of the Convention until 1968, gold provided the stability and the uniformity which the drafters intended. Converting the Warsaw limitation into United States dollars involved no more than a simple mathematical computation employing the official rate of gold, which remained virtually stable throughout that period.

8. The gold unit chosen was the French gold franc (colloquially known as the Poincare franc), which was defined as consisting of 65-½ milligrams of gold of millesimal fineness nine hundred. Thus, the limit of liability was fixed at 250 French gold francs per kilogram of lost cargo (Article 2(2)), convertible into national currency in round figures (Article 22(4)). In this respect, the drafters intended the gold value provisions to be read as referring to a definite and stable unit of account, not to a precious metal. *See Serbian Loans Case*, 1929 P.C.I.J., ser. A, Nos. 20/21 (Judgment of July 12), reported in 2 *World Court Reports* 344-401 (M. Hudson ed. 1935), discussed in 5 G. Hackworth, *Digest of International Law* 630-35 (1943). That case, decided in the year Warsaw was signed, involved the interpretation of various international loan agreements providing for payment based upon the gold franc. In construing those agreements, the P.C.I.J. held: "[i]t is manifest that the Parties, in providing for gold payments, were referring, not to payment in gold coins, but to gold as [a] standard of value." *Serbian Loans Case*, 2 *World Court Reports* at 365.

However, for a variety of reasons arising from a changing world economy, the central banks of most States instituted procedures in 1968 which separated their official monetary gold transactions from non-governmental commercial gold dealings. This resulted in a "two-tier" period, lasting until April 1, 1978, during which the stable official price of gold existed side by side with a constantly fluctuating commodity price for gold which, with the passage of time, radically diverged from the official price.⁹

Notwithstanding the existence of both a market price and an official price for gold throughout the two-tier period, there was no difficulty converting the Article 22 limitation into United States currency. Pursuant to a series of Civil Aeronautics Board ("CAB") orders, and as reflected on all air carrier tariffs and tickets involving air transportation to or from the United States, the Warsaw gold provisions were converted into dollars at the official price of gold. The CAB consistently adhered to this position, and the presently effective CAB regulation, Order 74-1-16, dated January 3, 1974 (A-36), so provides.

In 1975, in an attempt to ameliorate the severe economic pressures resulting from instability in the market price of gold, the International Monetary Fund (the "IMF")¹⁰ formulated a plan,

9. "[B]y the mid-1970's, gold had become a volatile commodity, not related to a price index, or to the rate of inflation, or indeed to any meaningful economic measure, other than the views of whoever made up the market about all of the terrible things going on in the unpredictable world." A. Lowenfeld, *Aviation Law* § 6.51, at 7-169 (2d ed. 1981). As an illustration of the volatility of the market price of gold, its price fell from approximately \$850 per ounce in January 1980 to approximately \$490 per ounce on April 2 of that year and then rose again to approximately \$700 per ounce in September 1980. During the twenty-four day period from January 5 to January 29, 1981, the market price of gold fell from approximately \$600 to \$493.75 per ounce. N.Y. Times, Jan. 30, 1981, at D1, col. 4.

10. The IMF was organized at the Bretton Woods Conference in 1944 to promote international monetary cooperation, to facilitate the growth of international trade, and to assist in the establishment of a multilateral system of payments for currency transactions among member States. The United States became a member of the IMF in 1945. See Bretton Woods Agreements Act, ch. 339, § 2, Pub. L. No. 79-171, 59 Stat. 512 (1945), *codified at* 22 U.S.C. § 286 (1976).

known as the Jamaica Accords, to replace the use of gold as an international monetary unit of account with Special Drawing Rights ("SDRs").¹¹

C. The Montreal Protocols

The Warsaw signatories met at Montreal in 1975 to attempt "to deal with the changes in the role of gold in international monetary transactions." Golden Memorandum, *supra*, at A-90. Their solution, embodied in the Montreal Protocols, was the substitution of SDRs for gold francs as the Warsaw conversion factor. *Id.* at A-90. There were two reasons for this solution: (i) as a consequence of recent IMF actions, SDRs would soon replace gold as the stable international monetary unit of account used for international transactions; and (ii) the use of SDRs as the Warsaw conversion factor would effectuate the drafters' goal of a predictable and stable factor to express Warsaw's limits of liability.

During the meetings at Montreal, the United States "took the lead" in suggesting SDRs as the standard of conversion¹² and signed Protocols No. 3 and No. 4,¹³ which adopt SDRs as the Warsaw unit of account. Those protocols, however, have not yet been ratified by the Senate.¹⁴

11. The SDR is a stable international unit of account, valued on the basis of a basket of five national currencies, which does not have a competing use as a commodity. Thus, SDRs are insulated from free market speculation and other problems which led to instability in the price of gold and to the ultimate breakdown of gold as an international unit of account. Employed as a medium of exchange between governments, central banks, and the IMF, the "SDR has first claim to recognition as the unit of account to replace gold in universal international organizations." J. Gold, *SDRs, Currencies, and Gold*, IMF Pamphlet Series No. 33, at 96 (Washington, D.C. 1980). See also the decision below at A-15-16, 690 F.2d at 310.

12. See A. Lowenfeld, *Aviation Law* § 6.51, at 7-171 (2 ed. 1981); see also Fitzgerald, *The Four Montreal Protocols to Amend the Warsaw Convention Regime Governing International Carriage by Air*, 42 J. Air L. & Com. 273, 325, 329-330 (1976).

13. Protocols No. 3 and No. 4 are reprinted in A. Lowenfeld, *Aviation Law* 985-1001 (2d ed. Supp. 1981).

14. On November 17, 1981, the Senate Committee on Foreign Relations reported 16 to 1 in favor of ratification of those Protocols. Senate Comm. on Foreign Relations, *Montreal Aviation Protocols Nos. 3 and 4*, S. Exec. Rep. No. 45, 97th Cong., 1st Sess. 5 (1981). Since the Protocols were not voted upon in 1982, they have been referred back to the Foreign Relations Committee.

D. The Decision of the Court Below

TWA argued in the courts below that the Warsaw gold provisions might be converted into United States currency by three alternative methods: (i) the last official price of gold in the United States; (ii) the SDR; and (iii) the exchange value of the modern French franc. Plaintiffs responded that the appropriate basis for conversion is the market price of gold.¹⁵

The district court concluded that the appropriate conversion factor is "the last official price of gold in the United States." A-27, 525 F. Supp. at 1289.

On appeal, the Second Circuit affirmed the decision of the district court but held that sixty days after the issuance of its mandate the Warsaw limitation of liability provisions would become unenforceable. The court of appeals reached that conclusion because:

While the Convention has not been formally abrogated, enforcement by national judicial tribunals is impossible without their picking and choosing among alternative units of conversion according to their view of which is best as an initial policy matter. We have no power to select a new unit of account. We thus hold the Convention's limitation of liability unenforceable by United States Courts. (A-6, 690 F.2d at 306.)

REASONS FOR GRANTING THE WRIT

Certiorari should be granted because this case raises the significant question of whether the courts of the United States may abrogate a provision of a treaty which is both constitutionally sound and capable of enforcement. In view of the fundamental principle that the Constitution reserves the power to abrogate treaties to the political branches of the government, it is respectfully submitted that the court of appeals incorrectly declared the

¹⁵ The court of appeals correctly held that basing Warsaw limits upon the market price of gold would constitute a "gross departure" from the Convention's purposes since gold's market rate "is simply the daily fluctuating price of a commodity, affected by conditions relating to supply and nonmonetary uses affecting demand" (A-15, 690 F.2d at 310).

limitation provisions of the Warsaw Convention to be prospectively "unenforceable in United States Courts." A-19, 690 F.2d at 311.

In addition, the Second Circuit erroneously failed to exercise its responsibility to construe the treaty in the light of changed circumstances so as to effectuate the intent of its drafters and adhering nations.

POINT I

THE COURT OF APPEALS WAS WITHOUT POWER TO DECLARE THE LIMITATION OF LIABILITY PROVISIONS OF THE WARSAW CONVENTION UNENFORCEABLE

In concluding that the limitation of liability provisions of the Warsaw Convention are unenforceable, the Second Circuit greatly exceeded its constitutional powers since it was effectively abrogating a treaty, an act which the Constitution reserves to the Executive and Legislative branches of the Government. U.S. Const., art. II, § 2, cl. 2. As this Court stated in *Doe ex dem. Clark v. Braden*, 57 U.S. (16 How.) 635, 657 (1854):

The treaty is therefore a law made by the proper authority, and the courts of justice have no right to annul or disregard any of its provisions, unless they violate the Constitution of the United States. It is their duty to interpret it and administer it according to its terms.

The rule of *Doe v. Braden*, to which this Court has consistently adhered (see *Whitney v. Robertson*, 124 U.S. 190, 194-95 (1888); *Terlinden v. Ames*, 184 U.S. 270 (1902)), is no less applicable because circumstances attendant to the original drafting of a treaty have changed.¹⁶

16. Courts have consistently held that a change in circumstances should not be permitted to defeat a treaty's original purpose. See, e.g., *Day v. Trans World Airlines, Inc.*, 528 F.2d 31, 35 (2d Cir. 1975), cert. denied, 429 U.S. 890 (1976) ("For a court to view a treaty as frozen in the year of its creation is scarcely more justifiable than to regard the Constitutional clock as forever stopped in 1787."); *Eck v. United Arab Airlines, Inc.*, 360 F.2d 804, 812 (2d Cir. 1966) (The language of a
(footnote continued on next page)

Thus, by abrogating a treaty, whose constitutionality it did not question¹⁷ and which is clearly capable of being construed so as to be effective, the Second Circuit ignored the rule of *Doe v. Braden* and unduly infringed upon the foreign relations power of the United States which the Constitution entrusts to coordinate branches of the government. If the Second Circuit's decision is allowed to stand, courts would be empowered to abrogate any of the myriad of treaties to which the United States is a party, a situation which could severely impact the foreign relations interests of the United States. It is for precisely such reasons that "a court will not ordinarily inquire whether a treaty has been terminated, since on that question 'governmental action . . . must be regarded as of controlling importance.'" *Baker v. Carr*, 369 U.S. 186, 212 (1962). See also *Terlinden v. Ames*, 184 U.S. 270 (1902).

(footnote continued from previous page)

treaty "should never become a 'verbal prison'"). Thus, gold's metamorphosis from an international unit of account into a mere commodity does not render the Convention unenforceable or preclude the judiciary from fulfilling its obligation to construe this treaty in accordance with the expectations of the contracting states. See, e.g., *Nielsen v. Johnson*, 279 U.S. 47, 51-52 (1929) ("Treaties are to be liberally construed so as to effect the apparent intention of the parties.").

17. Although the Second Circuit found the Warsaw limitation provisions unenforceable, it did not question the constitutionality of those provisions. However, in a decision rendered barely a month before the Second Circuit's opinion in *Franklin Mint*, the Ninth Circuit questioned the constitutionality of the Warsaw Convention's limitations of liability provisions. See *In re Aircrash in Bali, Indonesia on April 22, 1974*, 684 F.2d 1301 (9th Cir. 1982) [hereinafter cited as *Bali*]. The *Bali* court indicated in dicta that the Warsaw limitation of liability provisions might infringe plaintiffs' rights to due process as well as their right to freedom of travel, unless another remedy were available to provide them with full compensation. The Ninth Circuit then concluded that such a remedy is available under the Tucker Act, 28 U.S.C. § 1491, "if the liability limitation constitutes a 'taking' under the fifth amendment." *Bali*, 684 F.2d at 1310. However, the court of appeals did not decide that question since "[t]he question is properly one for the Court of Claims, when and if the Warsaw Convention limitation is applied to [the *Bali*] plaintiffs." *Id.* at 1312.

Indeed, it is submitted that the apparent conflict surrounding the constitutionality of the Warsaw Convention when coupled with the importance of the issue to the public and the aviation industry is a sufficient ground in and of itself for a grant of certiorari. See, e.g., *John Hancock Mutual Life Insurance Co. v. Bartels*, 308 U.S. 180, 181 (1939).

Indeed, the consequences which may flow from the abrogation of a treaty may be so severe that any attempt to abrogate a treaty, even by a branch of the government having the power to do so, must be totally unequivocal. While Congress has the power to abrogate or modify a treaty, the intention to do so must be clearly expressed; it will not be lightly imputed. See *Washington v. Washington State Commercial Passenger Fishing Vessel Assoc.*, 443 U.S. 658, 690 (1979); *Menominee Tribe of Indians v. United States*, 391 U.S. 404, 412-13 (1968); *Pigeon River Improvement, Slide & Boom Co. v. Charles W. Cox, Ltd.*, 291 U.S. 138, 160 (1934); *United States v. Lee Yen Tai*, 185 U.S. 213, 221-22 (1902); *Cook v. United States*, 228 U.S. 102, 120 (1933).

Significantly, in abrogating Article 22 of the Convention, the Second Circuit considered the foregoing factors in only a single paradoxical paragraph and an even more paradoxical footnote (A-17-18, 690 F.2d at 311 & n.26). Thus, the court of appeals noted that treaty negotiation, proposal and ratification are the exclusive province of other branches of the government; that the United States courts must observe the line between treaty interpretation and treaty negotiation, proposal and ratification; and that it is not the province of the courts to declare treaties abrogated. *Id.* Having set forth these undeniable conclusions, the Second Circuit then proceeded to declare that the treaty is unenforceable in its present form and that the proper unit of conversion may only be selected by the parties to the treaty rather than arrived at through construction by the courts.¹⁸

In short, the Second Circuit has taken the applicable principles "through the looking glass." In a supposed attempt to avoid offending other branches of the government or the Convention's signatories, by judicially selecting a unit of conversion for the Convention's cargo limitation provisions, the Second Circuit abrogated those provisions in their entirety. However, the

18. As discussed in Point II below, the Second Circuit failed to fulfill its duty to construe the Warsaw limitation provisions in accordance with the intent of the framers and the subsequent conduct of the adhering nations.

United States has given every indication via the Montreal Protocols that it continues to support a limitation,¹⁹ and every other signatory nation which has faced this issue, either through its courts or by legislation, has had no difficulty in selecting a conversion factor and has found that selection to be far preferable to allowing the Warsaw liability limits to lapse.²⁰

19. See discussion at page 7 above. Furthermore, it is equally apparent that the prospective abrogation of the Convention's limitation provisions contravenes Article 18 of the Vienna Convention on the Law of Treaties, reprinted in 8 I.L.M. 679, 686 (1969). Under that Article, the fact that the United States has signed the Montreal Protocols places it under an obligation to avoid undermining them during the ratification process. See generally *United States v. D'Auterive*, 51 U.S. 609, 623 (1850).

Thus, the Second Circuit's abrogation of Article 22 (by refusing to enforce any limitation) is completely at odds with the limits set forth in the Montreal Protocols and the obligation of the United States to refrain from acts, during the ratification process, which are inconsistent with the terms of a treaty it has signed. In contrast, continued use of the last official price of gold or adoption of the SDR as the Warsaw conversion factor would be fully consistent with the Vienna Convention since employing either conversion factor achieves the predictable and stable limits of liability as well as the approximate level of limitation sought by the Montreal Protocols.

Although the Vienna Convention has not been ratified by the United States, it is "generally recognized as the authoritative guide to current treaty law and practice" (Letter from Secretary of State William P. Rogers to the President (October 18, 1971) (transmitting the Vienna Convention) (S. Exec. Doc. L. 92nd Cong., 1st Sess.)). As such, it has been relied upon by United States courts. See, e.g., *Weinberger v. Rossi*, 50 U.S.L.W. 4354, 4355 n.5 (U.S. March 31, 1982); *Greater Tampa Chamber of Commerce v. Goldschmidt*, 627 F.2d 258, 263 n.4 (D.C. Cir. 1980); *Husserl v. Swiss Air Transport Co.*, 351 F. Supp. 702, 707 (S.D.N.Y. 1972), *aff'd per curiam*, 485 F.2d 1240 (2d Cir. 1973).

20. Nor, contrary to the court of appeals conclusion, is there "international disarray" with respect to the conversion issue (A-14, 690 F.2d at 309) since the record unequivocally demonstrates that no other signatory state has rejected the Convention's limitation on liability. And, as noted in *Benjamins v. British European Airways*, 572 F.2d 913, 919 (2d Cir. 1978), *cert. denied*, 439 U.S. 1114 (1979), decisions of "our sister signatories [are] entitled to considerable weight." Thus, notwithstanding the conversion factor employed, it is apparent that the Second Circuit failed to perceive the crucial factor that *some* limitation must be enforced in order to fulfill the expectations of the Convention's signatories.

Moreover, the ease with which the Convention may be enforced is illustrated by the fact that no other United States court which has had occasion to consider the question, either before or after the Second Circuit's decision, has found any difficulty in concluding that the primary purpose of the treaty is to employ some limitation and that the selection of a conversion factor is an entirely appropriate aspect of treaty construction. See *Franklin Mint Corp. v. Trans World Airlines, Inc.*, 525 F. Supp. 1288 (S.D.N.Y. 1981) (holding the last official price of gold to be the appropriate Warsaw conversion factor); *In re Air Crash Disaster at Warsaw, Poland on March 14, 1980*, 535 F. Supp. 833 (E.D.N.Y. 1982) (applying the last official price of gold) [hereinafter cited as *Polish Case*];²¹ *Boehringer Mannheim Diagnostics, Inc. v. Pan American World Airways, Inc.*, 531 F. Supp. 344 (S.D. Tex. 1981);²² *Electronic Memories & Magnetics Corp. v. The Flying Tiger Line, Inc.*, Index No. 784512 (Cal. Super. Ct., San Francisco Aug. 25, 1982) (applying the last official price of gold) (reprinted at A-60); and *Deere & Co. v. Deutsche Luft-hansa AG*, Index No. 81 C 4726 (N.D. Ill. Dec. 30, 1982) (applying the last official price of gold) (reprinted at A-61).

Indeed, the *Deere* court employed the last official price of gold as the conversion factor, on the theory that a constitutional treaty capable of enforcement must be enforced, even in the face of the Second Circuit's decision in *Franklin Mint*. Unfortunately, the district courts sitting in the Second Circuit, the primary situs for Warsaw Convention cases because virtually all international airlines are subject to personal jurisdiction in New York City, do not have the luxury of ignoring the Second Circuit's *Franklin Mint* decision. Thus, an incipient conflict has already arisen.

In sum, this case raises the substantial constitutional question of whether a United States court may abrogate a treaty provision

21. The *Polish Case* is presently on an interlocutory appeal to the United States Court of Appeals for the Second Circuit on an unrelated issue—the print size of the Warsaw notice on airline tickets.

22. *Boehringer* is presently on appeal to the United States Court of Appeals for the Fifth Circuit. It held the market price of gold to be the appropriate conversion factor, a result rejected in the *Polish Case*, by the *Deere* court, and by the Second Circuit in *Franklin Mint*.

which is constitutionally sound, is capable of being enforced, and is actually supported by numerous signatory states, merely because a change in circumstances requires the court to construe certain of its terms. It is submitted that this question is of major importance and has not been directly addressed by this Court. In view of the rather ancient vintage of this Court's prior decisions with respect to a court's power to abrogate a treaty, if the decision of the court below is permitted to stand without comment, it may be expected to lead to substantial uncertainty in the lower courts outside the Second Circuit and to a body of case law within the Second Circuit which is totally at odds with this Court's prior decisions concerning the principles to be applied to treaty construction. Since such a scenario points to the clear possibility that the Constitutional wall between the coordinate branches of the government will be eroded with respect to the power to abrogate treaties, this Court should review and modify the decision below.

POINT II

THE COURT OF APPEALS ERRONEOUSLY FAILED TO EXERCISE ITS CONSTITUTIONAL RESPONSIBILITY TO CONSTRUE THE WARSAW CONVENTION

In sharp contrast to its implicit conclusion that it was empowered to nullify a provision of a treaty adhered to by the United States, the court of appeals determined that it lacked authority to interpret the treaty²³ by selecting a unit of conversion on the ground that the "[s]ubstitution of a new term is a political question, unfit for judicial resolution." A-19, 690 F.2d at 311. The court of appeals reached this conclusion after rejecting TWA's argument that at least two alternative conversion factors—the last official price of gold or the SDR—are viable since employing

23. TWA submits that, far from lacking authority, the Second Circuit had an affirmative duty to interpret the treaty in order to effectuate the intent of the contracting parties. See, e.g., *Nielsen v. Johnson*, 279 U.S. 47, 51-52 (1929); *Jordan v. Tashiro*, 278 U.S. 123, 127 (1928); *Tucker v. Alexandroff*, 183 U.S. 424, 437 (1902); *Geofroy v. Riggs*, 133 U.S. 258, 271 (1890).

either unit results in a stable and predictable limit of liability which fully conforms to the purposes envisioned by the framers of the Convention as well as the subsequent conduct of the parties to the treaty.

A. The Last Official Price of Gold Is a Viable Conversion Factor

The district court held that the appropriate unit of conversion for determining Warsaw limits of liability is "the last official price of gold in the United States." A-27, 525 F. Supp. at 1289. That conclusion was based upon the following factors:²⁴

(i) employing the last official price of gold as a conversion factor completely effectuates the objectives of the Warsaw signatories—to fix predictable, stable and definite limits of liability for air carriers;

(ii) the only currently effective CAB Order dealing with the conversion issue, Order 74-1-16, employs the last official price of gold as the Article 22 conversion factor and specifically requires all United States air carriers to use that price in setting forth the dollar value of the Warsaw limitation on their tickets; and

(iii) the entire aviation industry has consistently conformed its conduct to Order 74-1-16; and, in light of that uniform practice, both shippers and carriers alike, including the parties hereto, adopt the last official price of gold as the Warsaw conversion factor in their contracts of carriage.

In addition to its application by the district court in this case, other courts, both before and after the Second Circuit's decision, have applied the last official price of gold as the conversion factor. *See, In re Air Crash Disaster at Warsaw, Poland on March 14,*

24. In lieu of setting forth its reasons in detail, the district court adopted TWA's arguments "to the extent that they support" its holding that the last official price of gold is the proper conversion factor (A-27, 525 F. Supp. at 1289).

1980, 535 F. Supp. 833 (E.D.N.Y. 1982); *Electronic Memories & Magnetics Corp. v. The Flying Tiger Line, Inc.*, Index No. 784512 (Cal. Super. Ct., San Francisco Aug. 25, 1982) (reprinted at A-60); and *Deere & Co. v. Deutsche Lufthansa AG*, Index No. 81 C 4726 (N.D. Ill. Dec. 30, 1982) (reprinted at A-61). In *Deere*, the court referred to the Second Circuit's decision in *Franklin Mint* and stated: "The [method of converting] which seems most nearly to effectuate the intention of the treaty to *limit* the liability of air carriers is to employ the last official United States Price of gold." A-63 (emphasis in original).

Although the Second Circuit concurred with the district court's finding that the Warsaw signatories intended to fix uniform and stable limits of liability, it rejected the use of the last official price of gold, notwithstanding the fact that the use of that conversion factor would effectuate the purposes of the Convention. In making this determination, the court of appeals placed primary reliance upon the repeal in 1976 of Section 2 of the Par Value Modification Act, 31 U.S.C. § 449 (1976) (the "Par Value Act"),²⁵ which required the Secretary of the Treasury to set a par value of the dollar in terms of gold. Based upon that repeal, the court of appeals concluded that "Congress . . . abandoned the unit of conversion specified by the Convention and did not substitute a new one" (A-19, 690 F.2d at 311); that the CAB Order upon which the district court relied had in effect lost its vitality; and that it could properly ignore the CAB's most recent policy determination that "the last official price is the best available standard."²⁶

25. Section 2 of the Par Value Act was repealed by Section 7 of the Bretton Woods Agreements Act, Pub. L. No. 94-564, 90 Stat. 2660 (1976) (the "1976 Act"), whose purpose was to amend financial legislation to reflect amendments to the IMF Articles of Agreement. The Senate commented upon the limited purpose of Section 7 by calling it a "technical amendment" whose purpose was to "delete language that is inconsistent with the new [IMF] Articles." S. Rep. No. 94-1148, 94th Cong., 2d Sess. 8, *reprinted in* 1976 U.S. Code Cong. & Ad. News 5935, 5943.

26. The most recent CAB staff memorandum to consider the conversion question, the Golden Memorandum, *supra*, at A-86, recommends that "the Board should take no action which would disturb the

However, far from reflecting a clear congressional intent to abandon the use of the last official price of gold as a medium of conversion under the Warsaw Convention, neither the 1976 Act itself nor the legislative history of that Act contains any reference to the Warsaw Convention.²⁷ Indeed, the Second Circuit commented that "Congress may not have focused explicitly upon the Convention in repealing [the Par Value] Act." A-18, 690 F.2d at 311. As a result, the Second Circuit's inference that Congress intended to abandon the Convention's unit of conversion is in direct contravention to this Court's admonition that "the intention to abrogate or modify a treaty is not to be lightly imputed to the Congress" (*Pigeon River Improvement, Slide & Boom Co. v. Charles W. Cox, Ltd.*, 291 U.S. 138, 160 (1934)), "but must appear clearly and distinctly from the words used in the statute" (*United States v. Lee Yen Tai*, 185 U.S. 213, 221 (1902)).

Moreover, as the CAB is the administrative agency charged with the regulation of the United States airline industry, its

(footnote continued from previous page)

conversion formula now contained in [Order 74-1-16] of the regulations." *Id.* at A-92. Furthermore, the CAB is continuing to endorse the continued use of the last official price of gold as a conversion factor. All United States air carriers are required to file their international tariffs with the CAB, see Federal Aviation Act of 1958, § 403, 49 U.S.C. § 1373 (1976), and they have continued to file using the last official price of gold. The CAB has ordered this procedure, has not modified that Order, and has not objected to the carriers' filings.

27. If anything, the legislative history of the repeal statute contemplates a continued role for gold, particularly in the international sphere, during the transition to SDRs as the unit of account. Thus, the Senate Committee on Foreign Relations noted: "While it is the expressed intent of the IMF to move gold out of the international monetary system, there are vast numbers of legal and psychological mechanisms still in evidence in the system that will perpetuate some role for gold." S. Rep. No. 94-1148, *supra*, at 5947.

orders and regulations are entitled to deference from the judiciary,²⁸ particularly with respect to the enforcement of existing treaty provisions.²⁹ The court of appeals improperly ignored the CAB's policy determination to employ the last official price of gold as the unit of conversion.

B. Special Drawing Rights Are a Viable Alternative Conversion Factor

Although the district court found the last official price of gold to be the most appropriate conversion factor for the Warsaw Convention's limitation of liability provisions, it noted that were it "writing on a clean slate" (A-27, 525 F. Supp. at 1289), it would have found TWA's arguments in favor of employing SDRs to be "most persuasive" (*id.*).

As stated above, SDRs are a stable international unit of account and indeed "have become the cornerstone of the new international system of finance." P. Samuelson, *Economics* 612 (11th ed. 1980); see Sir Joseph Gold, *Gold in International Monetary Law: Change, Uncertainty, and Ambiguity*, 15 J. Int'l L. & Econ. 323 (1981). Thus, their use as a medium of conversion would fully comply with the intent of the framers of the Convention since they would result in predictable and stable limits of liability.³⁰

In rejecting SDRs the Second Circuit clearly demonstrated a misunderstanding of their role as a conversion factor. TWA did

28. See, e.g., *Udall v. Tallman*, 380 U.S. 1 (1965); *Malrite T.V. of New York v. FCC*, 652 F.2d 1140, 1149 (2d Cir. 1981), *cert. denied*, 454 U.S. 1143 (1982). An agency regulation must be affirmed unless it is arbitrary, capricious, or an abuse of discretion (see Administrative Procedure Act § 10(e), 5 U.S.C. § 706(2) (A)); and "a reviewing court . . . is not empowered to substitute its judgment for that of the agency." (*FCC v. WNCN Listeners Guild*, 450 U.S. 582, 594 n. 30 (1981)).

29. See *Sumitomo Shoji America, Inc. v. Avagliano*, 102 S. Ct. 2374, 2379-80 (1982); *Kolovrat v. Oregon*, 366 U.S. 187, 194 (1961). See also *Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948).

30. SDRs have been adopted as the basis for converting Warsaw gold francs into national currencies by legislation or administrative acts in several foreign countries including the Federal Republic of Germany, Ireland, Norway, Sweden, and the United Kingdom. See Stephen A. Silard, A Comment on *Franklin Mint v. TWA* (Dec. 7, 1982) (unpublished manuscript presented to the Transportation Law Committee of the Federal Bar Association, Washington, D.C.).

not suggest that the court of appeals "set the [treaty] level of the limitation" (A-17, 690 F.2d at 310) either by selecting the number of SDRs which, in the Court's view, would result in an appropriate limitation of liability, or by adopting the number of SDRs employed in the as yet unratified Montreal Protocols. Rather, TWA pointed out that SDRs, as the present-day international unit of account, may be used to convert the original Warsaw limit of liability provisions, as expressed in gold francs, into dollars, in total compliance with the intent of the drafters and without any "legislative selection" on the part of the courts.³¹

The ease with which SDRs are employed as a conversion factor is demonstrated by the widely accepted international method for converting Warsaw gold francs to local currency, which is as follows:³²

- (1) On March 31, 1978, SDRs were an international unit of account with a gold value, and on that date Warsaw gold francs were easily convertible into SDRs.

31. Indeed, Second Circuit's rejection of SDRs because they are "a creature of an international body, the IMF" (A-17, 690 F.2d at 310), and because their value can change "at the whim of an international body distinct from the parties to the Convention" (A-17, 690 F.2d at 311) is demonstrative of a particularly narrow view. This view is rather surprising since the United States has ratified the multilateral treaty creating the IMF and has taken the lead in suggesting the adoption of SDRs as the Montreal Protocols' unit of conversion. Moreover, the Second Circuit overlooked the fact that a "seventy percent majority of the total voting power" of the 146 member nations is necessary to change the valuation of the SDR and an eighty-five percent majority is necessary to make a fundamental change in valuation. Art. XV, § 2 of the IMF's Articles of Agreement. Even non-members of the IMF, including Switzerland, agree that the SDR should be used as the best monetary unit of account to express limitations of liability in treaties.

32. See *The Netherlands v. Giants Shipping Corp.*, Rechtspraak van de Week 321 (May 30, 1981) (Sup. Ct. of The Netherlands May 1, 1981), discussed *infra*. The United Kingdom has adopted SDRs as the unit of account for purposes of converting the gold value clause of the Convention into sterling. Pursuant to Statutory Instrument 1980 No. 281, the gold franc is converted into SDRs using the gold value of an SDR in effect on April 1, 1978. SDRs are then converted to sterling at the current SDR/sterling rate. Other nations which convert Warsaw gold francs through the use of SDRs are listed *supra* note 30.

(2) On April 1, 1978, the IMF member nations, including the United States, severed the link between gold and the SDR as well as between gold and their national currencies. The value of SDRs was measured according to the value of a weighted basket of currencies;³³ and national currencies were convertible into SDRs.

(3) On one day, April 1, 1978, the basket value of the SDR was precisely the same as its gold value had been the day before. As a result, it is possible to convert Warsaw gold francs into SDRs.³⁴

(4) Therefore, the SDR performs the function of a Rosetta stone and can translate original Warsaw gold francs into current U.S. dollars, since there is an unbroken line of value between gold, SDRs, and national currencies.

This is precisely the method used by the Supreme Court of the Netherlands in a case involving a conversion issue virtually identical to this one. *The Netherlands v. Giants Shipping Corp.*, *Rechtspraak van de Week* 321 (May 30, 1981) (Sup. Ct. of

33. See *supra* note 11.

34. The mathematical computation converting French gold francs into U.S. dollars would be as follows. The value of the SDR on March 23, 1979, the date the cargo was delivered to TWA, has been used for illustrative purposes.

1 Poincare franc (90% fine gold)		= 0.0655 gram of fine gold
1 Poincare franc (100% fine gold)		= 0.05895 gram of fine gold
1 SDR (gold value on March 31, 1978)		= 0.888671 gram of fine gold
The number of francs in one SDR	= $\frac{0.888671}{0.05895}$	= 15.075 rounded to 15
The Warsaw limit of 250 francs per kilogram converted to SDRs	= $\frac{250}{15}$	= 16.67 SDRs per kilogram, rounded to 17 SDRs
Dollar value of 1 SDR on March 23, 1979		= 1.28626
17 SDRs per kilogram times 1.28626		= \$21.87 per kilogram.

The Netherlands May 1, 1981) (reprinted in English at A-65).³⁵ The *Giants Shipping* case is the only decision on point rendered by the highest court of any Warsaw signatory. And since uniformity of international law is a primary purpose of the Convention, this Court should give great weight to the interpretation of the highest courts of other adherents. See *Pigeon River Improvement, Slide & Boom Co. v. Charles W. Cox, Ltd.*, 291 U.S. 138 (1934), where this Court looked to the interpretation of a treaty given by the Supreme Court of Canada.³⁶

Finally, the use of SDRs as a unit of conversion is totally consistent with fundamental tenets of treaty construction. It has been uniformly held that treaties are to be interpreted liberally: (i) to effectuate the intent of the drafters;³⁷ (ii) in light of

35. In *Giants Shipping*, the Dutch court calculated that fifteen gold Poincare francs had the equivalent gold weight of one SDR on April 1, 1978. It was then a simple matter to convert from SDRs to Dutch currency for any given day by merely looking at a financial publication similar to *The Wall Street Journal*. The *Giants Shipping* court construed a limitation of liability provision set forth in the Convention Relating to the Limitation of the Liability of Owners of Sea-going Ships (Brussels, 1957) (the "Brussels Convention"). The Brussels Convention is strikingly similar to the Warsaw Convention in many respects, including the fact that the limitation of liability provisions in both are expressed in French Poincare gold francs.

36. See also *Block v. Compagnie Nationale Air France*, 386 F.2d 323, 337-38 (5th Cir. 1967), cert. denied, 392 U.S. 905 (1968) ("A multilateral treaty is rather like a 'uniform law' within the United States. The Court has an obligation to keep interpretation as uniform as possible."); *Benjamins v. British European Airways*, 572 F.2d 913, 919 (2d Cir. 1978), cert. denied, 439 U.S. 1114 (1979) ("We do find the opinions of our sister signatories to be entitled to considerable weight.").

37. See, e.g., *Nielsen v. Johnson*, 279 U.S. 47, 51-52 (1929) ("Treaties are to be liberally construed so as to effect the apparent intention of the parties."); *Eck v. United Arab Airlines, Inc.*, 360 F.2d 804, 812 (2d Cir. 1966); *Day v. Trans World Airlines, Inc.*, 528 F.2d 31, 35 (2d Cir. 1975), cert. denied, 429 U.S. 890 (1976).

changed circumstances;³⁸ and (iii) in accordance with the subsequent conduct of the parties.³⁹

In sum, gold no longer performs the function of an international unit of account. That function is now performed by SDRs. Because the SDR's gold value on March 31, 1978 was the same as its new basket of currencies value on April 1, 1978, there is an unbroken line of value which a court should use to effectuate the intent of the parties to the treaty and convert the Warsaw gold francs into U.S. dollars. The Second Circuit failed to effectuate the framers' intent. Instead, it abrogated a major provision of the treaty.

38. See *Missouri v. Holland*, 252 U.S. 416, 433 (1920) (In the words of Mr. Justice Holmes concerning Constitutional construction, which are equally applicable to treaty interpretation: "[W]hen we are dealing with words that also are a constituent act . . . we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters."); *Day*, 528 F.2d at 35; *Eck*, 360 F.2d at 812 (The language of a treaty should not become a "verbal prison." A change in circumstances may not be permitted to defeat a treaty's original purposes "even if this requires departing in some measure from the letter [of the treaty provision] and reading the language in a practical rather than literal fashion.").

39. *Pigeon River Improvement, Slide & Boom Co. v. Cox*, 291 U.S. 138, 158-63 (1934); *Day*, 528 F.2d at 35 ("The conduct of the parties subsequent to ratification of a treaty may, thus, be relevant in ascertaining the proper construction to accord the treaty's various provisions."). In this case, the subsequent conduct of the parties would support the use of the last official price of gold or SDRs as conversion factors. When the Warsaw parties met in 1971 and drafted the Guatemala City Protocol (the terms of which were later incorporated into the Montreal Protocols), they discussed limits of liability based on the official price of gold. In 1974, the Legal Committee of the International Civil Aviation Organization ("ICAO"), an affiliate of the United Nations, supported the use of the official price of gold, condemning the use of the free market price. Legal Committee, 21st Sess., Minutes 84, ICAO Doc. 9131-LC/173-1, Resolution Concerning the Conversion of Poincare Francs to National Currencies in the Warsaw and Rome Conventions, at 2 (1974). And finally, in 1975 the drafters of the Montreal Protocols chose a limit of liability for cargo which had the same value as the Warsaw limit converted according to the official price of gold. The Montreal Protocols limit of 17 SDRs per kilogram is worth approximately \$20 per kilogram. The Warsaw limit of 250 gold francs per kilogram, converted into dollars according to the last official price of gold, is \$20 per kilogram. See CAB Order 74-1-16, at A-38.

CONCLUSION

Certiorari should be granted.

Respectfully submitted,

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JAN 15 1983

ALEXANDER L. STEVAS,
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1982 .

TRANS WORLD AIRLINES, INC.,

Petitioner,

v.

FRANKLIN MINT CORPORATION, FRANKLIN
MINT LIMITED, AND MCGREGOR, SWIRE
AIR SERVICES LIMITED,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

APPENDIX

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A-1

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 999—August Term, 1981

(Argued April 22, 1982 Decided September 28, 1982)

Docket No. 82-7012

FRANKLIN MINT CORPORATION, FRANKLIN MINT LIMITED,
and MCGREGOR, SWIRE AIR SERVICES LIMITED,

Plaintiffs-Appellants,

—v.—

TRANS WORLD AIRLINES, INC.,

Defendant-Appellee.

Before:

OAKES, CARDAMONE, and WINTER,

Circuit Judges.

Appeal from a final judgment of the United States District Court for the Southern District of New York, Whitman Knapp, Judge, utilizing the last official price of

gold to calculate the limit on defendant's liability under the Warsaw Convention.

The Court holds the limitation provision of the Convention prospectively unenforceable and affirms.

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WINTER, *Circuit Judge:*

This is an appeal from a final judgment of the United States District Court for the Southern District of New York, Whitman Knapp, *Judge*, limiting the defendant's

liability under the Warsaw Convention ("Convention")¹ for loss of cargo. In determining the limit in United States dollars, Judge Knapp utilized the last official price of gold as a unit of conversion and awarded plaintiffs \$6,475.98. 525 F.Supp. 1288 (S.D.N.Y. 1981). Plaintiffs appeal, claiming the limit should have been calculated by other methods. While we agree with the result reached in this case and thus affirm, we hold the Convention's limit on liability prospectively unenforceable in United States Courts.

SUMMARY OF THE ISSUES AND DECISION

The facts in this case, if nothing else, are clear cut. In March, 1979, plaintiffs Franklin Mint Corporation, Franklin Mint Limited, and McGregor, Swire Air Services Limited (collectively, "Franklin Mint") contracted with defendant Trans World Airlines, Inc. ("TWA") for the carriage by air from the United States to England of 714 pounds of numismatic materials. Though the articles were worth more than \$6,500, Franklin Mint made no special declaration of value. The articles were either lost or destroyed, thus rendering TWA liable under Article 18 of the Convention.² Because of the absence of a special

¹ The Warsaw Convention is formally known as the "Convention for the Unification of Certain Rules Relating to International Transportation by Air," opened for signature October 12, 1929, 49 Stat. 3000, T.S. No. 876, 137 L.N.T.S. 11 (adherence of the United States proclaimed October 29, 1934).

² Article 18 of the Convention reads:

(1) The carrier shall be liable for damage sustained in the event of the destruction or loss of, or of damage to, any checked baggage or any goods, if the occurrence which caused the damage so sustained took place during the transportation by air.

(2) The transportation by air within the meaning of the preceding paragraph shall comprise the period during which the baggage or

declaration, TWA sought to limit its liability under Article 22 of the Convention.

Article 22 limits the carrier's liability for injuries to both "checked baggage and . . . goods" and "objects of which the passenger takes charge himself."³ The various limits are stated in terms of a specified number of French gold or "Poincare" francs, a unit of account consisting of "65½ milligrams of gold at a standard fineness of nine

goods are in charge of the carrier, whether in an airport or on board an aircraft, or, in the case of a landing outside an airport, in any place whatsoever.

(3) The period of the transportation by air shall not extend to any transportation by land, by sea, or by river performed outside an airport. If, however, such transportation takes place in the performance of a contract for transportation by air, for the purpose of loading, delivery or transshipment, any damage is presumed, subject to proof to the contrary, to have been the result of an event which took place during the transportation by air.

3 Article 22 of the Convention reads:

(1) In the transportation of passengers the liability of the carrier for each passenger shall be limited to the sum of 125,000 francs. Where, in accordance with the law of the court to which the case is submitted, damages may be awarded in the form of periodical payments, the equivalent capital value of the said payments shall not exceed 125,000 francs. Nevertheless, by special contract, the carrier and the passenger may agree to a higher limit of liability.

(2) In the transportation of checked baggage and of goods, the liability of the carrier shall be limited to a sum of 250 francs per kilogram, unless the consignor has made, at the time when the package was handed over to the carrier, a special declaration of the value at delivery and has paid a supplementary sum if the case so requires. In that case the carrier will be liable to pay a sum not exceeding the declared sum, unless he proves that that sum is greater than the actual value to the consignor at delivery.

(3) As regards objects of which the passenger takes charge himself the liability of the carrier shall be limited to 5,000 francs per passenger.

(4) The sums mentioned above shall be deemed to refer to the French franc consisting of 65½ milligrams of gold at the standard of fineness of nine hundred thousandths. These sums may be converted into any national currency in round figures.

hundred thousandths." The limit on baggage or other goods is 250 Poincare francs per kilogram. The dollar value of that limit is calculated simply by converting the gold value of the specified unit into United States dollars, e.g., the limit per kilogram is 250 multiplied by the dollar value of 65½ milligrams of gold.

The difficulty arises from the fact that when Article 22 was drafted, gold served official monetary functions and its price was set by law. The Convention thus selected it as the unit of conversion in order to ensure judgments of uniform value as well as a stable and easily calculable limitation on liability. The plain but highly troublesome fact is that by international agreement and United States domestic legislation gold has now lost its monetary functions and no longer has an official price. Unfortunately for parties to international airline transactions as well as for us, the terms of Article 22 continue to utilize gold as the unit of conversion. Thus, the parties raise the issue of what unit of account is now to be used to convert judgments under the Convention into United States dollars.

In arguing the issue, the parties offer four alternatives: (i) the last official price of gold in the United States; (ii) the free market price of gold; (iii) the Special Drawing Right ("SDR"), a unit of account established by the International Monetary Fund ("IMF") and recently proposed as a substitute for gold in the as yet unratified Montreal Protocols to the Convention; and (iv) the exchange value of the current French franc. While acknowledging that "the arguments in favor of . . . the SDR [were] most persuasive," Judge Knapp nevertheless held that the last official price of gold was the appropriate standard. This choice was predicated on the view that this standard "has been . . . espoused by the Civil Aero-

navitics Board ("CAB"), the government agency most intimately concerned with the transaction at hand," and has been "used by all domestic carriers—including TWA—in calculating the dollar value of the Article 22 limitation printed on their tariffs." 525 F.Supp at 1289.

We share Judge Knapp's doubt about the result. Indeed, there are powerful arguments against each of the proffered solutions. The last official price of gold is a price which has been explicitly repealed by the Congress. See note 11, *infra*, and accompanying text. It thus lacks any status in law or relationship to contemporary currency values. The free market price of gold is the highly volatile price of a commodity determined in part by forces of supply and demand unrelated to currency values. SDR's are a creature of the IMF, modified at will by that body and having no basis in the Convention. The French franc is simply one domestic currency, subject to change by the unilateral act of a single government.

Every proffered solution thus appears to have a devastating argument against it. While the Convention has not been formally abrogated, enforcement by national judicial tribunals is impossible without their picking and choosing among alternative units of conversion according to their view of which is best as an initial policy matter. We have no power to select a new unit of account. We thus hold the Convention's limitation of liability unenforceable by United States Courts.

BACKGROUND

Drafted in the late 1920's, the Convention was designed both to protect the fledgling aviation industry from the alternatives of ruinous damage suits or exorbitant insurance premiums and to insure a certain degree of uniform-

ity of legal obligation given the expected international character of the industry. See A. Lowenfeld and A. Mendelsohn, *The United States and the Warsaw Convention*, 80 Harvard L. Rev. 497, 499-501 (1967) (hereafter "Lowenfeld and Mendelsohn"); see also *Reed v. Wiser*, 555 F.2d 1079, 1089 (2d Cir.), cert. denied, 434 U.S. 922 (1977) and CAB Staff Memorandum, Warsaw Convention Liability Limits, March 18, 1980, at 5-6. (App. at 43-44). A series of rules governing liability, affirmative defenses and limitations accomplished the former goal, while the Convention's international scope accomplished the latter. Articles 17, 18 and 19 enunciate the carrier's liability for personal injuries, for damage or loss of baggage, and for damage due to delay. Articles 20 and 21 establish as affirmative defenses lack of fault and contributory negligence. Finally, Article 22 provides a limitation on the extent of liability for both personal injury and loss of luggage or other goods.

The personal injury limitations amounts have been subject to upward revision from time to time through protocols to the original agreement. These revisions have come in the wake of a continuing debate, with the developed countries, notably the United States, Great Britain and France, arguing for higher limits, and the less developed nations seeking reduction of the existing limit.⁴

⁴ In 1955, at The Hague, the conferees would agree only to a doubling of the limit to 250,000 Poincare francs or \$16,600. Lowenfeld and Mendelsohn at 504-09. The United States unenthusiastically signed the Hague Protocol a year later, but did not present the treaty to the Senate until July 1959. Lowenfeld and Mendelsohn at 515. The Senate never ratified the Protocol because of its low limit, however, and ultimately the Kennedy/Johnson Administrations actually threatened United States denunciation of the Convention. This threat came in the wake of Congress' failure to enact a legislative package ratifying the Hague Protocol while compelling the purchase by all American air carriers of \$50,000 in insurance for each passenger. To avoid United States denunciation, a conference met in Montreal in the spring of

Lowenfeld and Mendelsohn at 504. Throughout this period, the level of the limitations on liability for loss or destruction of checked baggage and other goods has remained the same.

Defining recoveries in terms of a specified amount of gold was intended to produce stability and uniformity. Such a common standard allowed the conversion of liability limits into national currencies and insulated recoveries from the vicissitudes of currency fluctuation and devaluation. In drafting the Convention, a proposal to fix recoveries purely in terms of the French franc was rejected by Switzerland on the ground that use of a single national currency rendered the liability limit subject to change by the act of one government. See Second International Conference on Private Aeronautical Law, Minutes, October 4-12, 1929, Warsaw, at 88-89 (Horner and Legrez trans. 1975), (App. at 247-248). As the Swiss delegate put it, "Naturally one can say 'French franc' but . . . its [France's] national law which determines it, and one need have only a modification of the national law to overturn the essence of this provision." *Id.* at 89-90, (App. at 248-249). Accordingly, the Swiss pressed for a standard which tied the limitation to a gold value regardless of the national currency actually named in the article. *Id.* at 90, (App. at 249). The conferees accepted the Swiss position and stated the limitation in terms of the Poincare franc

1966. The result of this meeting was the so-called Montreal Agreement "which provided for absolute carrier liability up to \$75,000 on all flights into or out of the United States." *Reed v. Wiser*, 555 F.2d at 1087. Appeased, the United States withdrew its denunciation. However, it continued to press for an amendment to the Convention raising personal injury liability limits. In 1971, the parties promulgated the Guatemala City Protocol under which personal injury limits were to be raised to \$100,000 at the then current exchange rate of \$35 per ounce of gold." *Id.* at 1089 n.12. However, the United States has not ratified that protocol.

defined as "65½ milligrams of gold at a standard fineness of nine hundred thousandths." Convention, art. 22 § (4).⁵

From October, 1934, when the United States first adhered to the Convention, until 1978, use of gold as unit of account posed no problem for United States Courts or the judicial tribunals of other signatory nations. In 1934, the value of gold was set at \$35 per troy ounce pursuant to statute, United States Gold Reserve Act of 1934, Pub. L. No. 73-87, 48 Stat. 337 (1934). When the United States became a party to the International Monetary Fund (IMF) in 1945, see Bretton Woods Agreements Act, ch. 339, § 2, Pub. L. No. 79-171, 59 Stat. 512 (1945) (codified at 22 U.S.C. § 286 (1976)), it promised to maintain (and, if necessary, redeem) the value of United States dollars in terms of gold. For purposes of the Convention's limits on liability, therefore, the relationship of gold and the dollar allowed judicial tribunals to award judgments on a stable, uniform basis.

At the time of Bretton Woods, the United States dollar was grossly undervalued and was actually an asset more valuable than gold. The promise to redeem all dollars in gold could thus be made without having to be fulfilled.⁶ From 1955, however, the United States faced a persistent

⁵ There was only one change made in this standard at the Hague in 1955. To avoid any confusion, the conferees deleted reference to the Poincare franc and defined the specified sums as referring "to a currency unit consisting of sixty-five and a half milligrams of gold of millesimal fineness nine hundred." Asser, *Golden Limitations of Liability in International Transport Conventions and the Currency Crisis*, 5 J. Mar. L. & Com. 645, 647-48 n.7 (1974). Since the United States never ratified the Hague Protocol, the old language still governs American courts. That change, however, is entirely formal, since the elimination of any reference to the French franc merely clarified the Convention's desire to use gold, a point never doubted in the United States.

⁶ See P. Samuelson, *Economics*, 686-88 (8th ed. 1970).

balance of payments deficit. Where once there existed a dollar shortage, there now developed a dollar glut.⁷ To compensate, central banks abroad began trading their dollars for gold, and hoarders and speculators began accumulating the metal in increasing amounts. From 1955 to 1968, United States gold reserves plummeted from approximately \$24 billion to around \$10 billion.⁸

These events led ultimately to the demise of the gold standard. In early 1968, depletion of the United States gold reserve led the central banks of Belgium, the Federal Republic of Germany, Italy, the Netherlands, Switzerland, the United Kingdom and the United States to agree to discontinue supplying gold to private markets. A so-called "two-tier" system of gold pricing—a market price set accordingly and the official price set under Bretton Woods⁹—was thus created. This eased the pressure but could not remedy the essential flaw. In addition to persistent United States balance of payment deficits, international gold reserves grew more slowly than the volume of world economic activity. As a consequence, banks faced pressures to liquidate official holdings in light of readily available market profits. The stage was thus set for abandonment of the Bretton Woods arrangements.

In August, 1971, the United States suspended its commitment to convert dollars for gold.¹⁰ In May, 1972, it devalued the dollar by raising the official price of gold to \$38 per ounce. See Par Value Modification Act, Pub. L.

⁷ *Id.* at 690-91.

⁸ *Id.* at 691, Figure 36-1.

⁹ See Asser, *supra* note 6, at 650; Gold, *International Monetary Law: Change, Uncertainty and Ambiguity*, 15 J. Int'l L. & Econ. 323, 340-41; Samuelson, *supra* note 7, at 698-99.

¹⁰ *Id.* at 641; Asser, *supra* note 6, at 651.

No. 92-268, § 2, 86 Stat. 116 (1972) (formerly codified at 31 U.S.C. § 449 (1972)). In October, 1973, yet another devaluation raised the price to \$42.22 per ounce. *See* Par Value Modification Act, amendments, Pub. L. No. 93-110, § 1, 87 Stat. 352 (1973) (formerly codified at 31 U.S.C. § 449 (1976)).

The dollar's troubles led the IMF to put forth a plan to abolish the official price of gold, to delete references to gold in its articles, and to substitute SDR's as the Fund's reserve asset and unit of account. The plan was proposed in the 1976 Jamaica Accords, was passed by the Fund's members and became effective April 1, 1978. In the interim, the United States passed implementing legislation including a repeal of the Par Value Modification Act of 1973 and the abolition of the official price of gold.¹¹ Along with the Jamaica Accords, the measure also became effective on April 1, 1978.

This radical change in the international monetary system created an obvious problem under the Warsaw Convention. With gold abandoned as a currency base and the official price repealed, gold became a commodity with a daily fluctuating free market price. That the difficulty in continuing to use gold as a monetary base undermined the Convention's unit of conversion was immediately recognized. Thus, the Warsaw conferees met in Montreal in 1975, even before the Jamaica Accords, and drafted and signed a Protocol substituting SDR's as the Convention's unit of conversion. At the time of the proposal, the SDR

¹¹ In repealing the official price generally, Congress retained its use for the limited purpose of determining the value of gold held in the form of gold certificates. *See* 31 U.S.C. § 4056. The Senate noted that this was the "only domestic purpose for which it is necessary to define a fixed relationship between the dollar and gold" S. Rep. No. 94-1295, 94th Cong., 2d Sess. 18, *reprinted in* [1976] U.S. Code Cong. & Ad. News 5935, 5966-67.

was calculated in terms of gold.¹² With the Jamaica Accords, the referent was changed to a basket of 16 national currencies, and in January, 1981, the basket was reduced to five currencies.¹³ The Montreal Protocol was presented to the United States Senate in January, 1977 but has not been ratified.

Meanwhile, parties to the Convention have utilized a variety of units of conversion. The record shows Sweden and Britain have adopted SDR's for purposes of Warsaw.¹⁴ Both a Netherlands court and the Civil Court of Rome reached the same result.¹⁵ Two French courts have recently decided that the Warsaw unit is to be converted simply into the current French franc.¹⁶ The United States District Court in the Southern District of Texas recently opted for the free market price of gold,¹⁷ the standard

¹² Gold, *supra* note 10, at 345.

¹³ Ward, *The SDR in Transport Liability Conventions: Some Clarifications*, 13 J. Mar. L. & Com. 1, 3 (1981).

¹⁴ See Sweden's Carriage by Air Act (1957), amendment to Chapter 9, § 22, effective April 27, 1978, (translated and reprinted in App. at 57-61); see also the British Carriage by Air (Sterling Equivalents) Order of 1980, Statutory Instrument 1980 No. 281, effective March 21, 1980, (reprinted in App. at 62-63).

¹⁵ *State of the Netherlands v. Giant Shipping Corp.*, Rechtspraak van de Week, 30, May, 1981, 321 (Supreme Court of the Netherlands, May 1, 1981) (translated and reprinted in App. at 64-93); *Linee Aerea Italiane v. Ricciole* (Rome Civil Court Judgment 609/1979, Nov. 14, 1978), (translated and reprinted in App. at 95-108).

¹⁶ See *Chamie v. Egyptair* (Cours d'appel Paris, Jan. 31, 1980) (translated and reprinted in App. at 171-91); *Pakistan Int'l Airlines v. Compagnie Air Inter. S.A.*, (Cours d'appel Aix-en-Provence Oct. 31, 1981) (translated and reprinted in App. at 156-70).

¹⁷ *Boehringer Mannheim Diagnostics, Inc. f/k/a Hycel, Inc. v. Pan American World Airways, Inc.*, 531 F.Supp. 344 (S.D. Tex. 1981).

utilized by an Indian court,¹⁸ and a Greek court.¹⁹ Finally, the last official price of gold, chosen by the District Court in this case, was relied upon by Judge Sifton in *In re Air Crash Disaster at Warsaw Poland on March 14, 1980*, 535 F.Supp. 833 (E.D.N.Y. 1982) and is still utilized by the CAB pursuant to a 1974 order.

DISCUSSION

The controlling facts in this case are: (i) enforcement of the Convention's limitation on liability requires a unit of conversion to translate judgments into domestic currency; (ii) there is no longer an internationally agreed upon unit of conversion; and (iii) there is no United States legislation specifying a unit to be used by United States Courts.

The need for a unit of conversion is self-evident. Without it, a rational limit on liability cannot exist, much less one which produces judgments of equal value in different currencies.

The lack of an internationally agreed upon unit is also obvious. The very convening of the Montreal meeting in 1975 was a recognition by the Warsaw parties that the Convention's unit had been eliminated by events. In plain fact, different countries now apply different units. Although the alternatives argued before us yield limitations on TWA's liability in this case ranging from less than \$6,500 to over \$400,000, each has been adopted as the proper unit of account by at least one party, or domestic

¹⁸ *Kuwait Airways Corp. v. Sanghi*, Regular Appeal No. 54 of 1977 (Civil Station, Bangalore, India, August 11, 1978) (reprinted in App. at 265-71.)

¹⁹ *Zakoapolos v. Olympic Airways Corp.*, No. 256 of 1974 Ct. of App.; 3d Dep't., Athens, Greece (February 15, 1974) (translated and reprinted in App. at 251-54.)

tribunal of a party, to the Convention. This disarray merely confirms the obvious fact that the Jamaica Accords destroyed the international arrangements which had led to adoption of gold as a unit of conversion.

International disarray is also reflected in the lack of legislation in the United States implementing the Convention by establishing a unit of conversion. While the "last" official price of gold is offered as a possible unit, "last" is really a euphemism for "no longer" or "repealed." The repeal of the Par Value Modification Act in 1978 was in every sense a legislative declaration that the price of \$42.22 per troy ounce was no longer recognized by the United States.²⁰ We fail to see the logic in adopting as a legal standard a specified value for gold which has been specifically rejected by the United States Congress. Congress' action, moreover, as well as that taken by the other parties to the Jamaica Accords, is highly relevant to the Convention. The repeal of the Par Value Modification Act was based on a domestic and international conclusion that the official price of gold was wholly out of touch with economic and monetary reality. Since use of a fixed amount of gold as the Convention's unit was specifically designed to establish a limitation level at a certain value, this repeal must be taken as a statement that the official price no longer reflects that specified value. The case for continuing to use the now repealed price of gold thus finds no support in law or logic.

The CAB order on which Judge Knapp relied was expressly premised on the existence of an official price under the Par Value Modification Act of 1973. The more recent internal CAB memorandum supporting continua-

²⁰ The sole remaining use of the last official price is in determining the value of gold held in the form of gold certificates. See note 12, *supra*. That is not relevant to the issues here.

tion of that order is based ultimately on a policy determination that the last official price is the best available standard.²¹ The inconsistency of the CAB position, however, is starkly evident. It rejects SDR's because the Senate has not ratified the Montreal Protocol, while adopting the last official price of gold which has been explicitly rejected by the Congress. The sole criterion supporting the CAB's position appears to be the law of inertia.

The other alternatives have an equally infirm base. Neither the free market price of gold nor the current French franc was ever agreed to by the treaty's framers, both are gross departures from its purposes, and, as to the latter, there is ample evidence that it was specifically rejected. The framers clearly contemplated use of the governmentally fixed price of gold in adopting it as a unit of account in the hope of providing stability. The free market price of gold, however, is simply the daily fluctuating price of a commodity, affected by conditions relating to supply and nonmonetary uses affecting demand. The current French franc is similarly flawed. To enforce it would amount to a deliberate departure from the expressed wishes of the framers to avoid the use of a single national currency subject to unilateral action.

TWA argues that we should adopt the International Monetary Fund's SDR as the unit of conversion. It is true that the SDR was "created by the IMF in 1969 to replace gold and foreign exchange as an international reserve

²¹ CAB Internal Memorandum, Warsaw Convention Liability Limits, May 20, 1981 (App. at 32-38).

²² Appellant's reliance on dicta in our decision *Reed v. Wiser*, 555 F.2d at 1089 n.12, is misplaced. The *Reed* footnote implied a free market standard under the Guatemala City Protocol which the U.S. has not ratified.

asset."²³ "[M]ember central banks may exchange SDR's for other convertible currencies and, therefore, SDR balances are actually lines of credit against which reserves may be borrowed for use in central bank operations."²⁴ As noted above, methods of calculating SDR's have been changed from time to time. They are presently calculated with reference to a so-called basket of five currencies—the U.S. dollar, the Deutsche mark, the French franc, the Japanese yen, and the pound sterling. The amount of each currency in one SDR is a function of the percentage weights which are assigned to each currency in the basket. The dollar value of one SDR is then determined by adding the "dollar values of each currency component based on daily market exchange rates."²⁵

Though the value of any one currency in terms of SDR's fluctuates from day to day, SDR fluctuations are generally less extreme than fluctuations in the free market price of gold. The relative stability of the SDR has thus led the Warsaw signatories to propose its substitution as the Convention's unit of account. The proposal was formally drafted in 1975 as part of the Montreal Protocols to the Convention and has been presented to the signatory states for ratification. Though the substitution was supported by the United States, there has been opposition by non-IMF signatories and very few signatories (the United States included) have actually ratified the Protocol.

The inappropriateness of our adopting SDR's as the unit of conversion is plain. The Convention itself con-

²³ Ward, *supra* note 14, at 2.

²⁴ *Id.*

²⁵ *Id.* at 3.

tains not the slightest authority for its use and the Senate has thus far declined to ratify the Montreal Protocols. Moreover, the decision in principle to use SDR's is only the first step. After that, a further step must be taken to define the limitation of liability in terms of a particular number of SDR's per kilogram of baggage. In effect, we would have to set the level of the limitation. Finally, the SDR is a creature of an international body, the IMF, and is subject to modification or outright elimination by that body. In fact, the method of calculating SDR's has been changed three times in the last seven years. This Court has no power under the terms of the Convention or relevant domestic source of authority to adopt a unit of conversion variable at the whim of an international body distinct from the parties to the Convention.

It is thus clear that neither international nor domestic sources of law specify a unit of account for purposes of the Convention. We deal here not with ambiguities which may be clarified by reference to underlying purpose or with language which inadequately mirrors the understood intentions of the drafters. For almost two generations, the Convention's limits on liability have been translatable into domestic currency values by application of a clear and easily applied formula. An essential ingredient of that formula has, as a consequence of international action followed by domestic legislation, ceased to exist. What the parties ask us to do is to select, upon the basis of our judgment as to what is best as a matter of policy, a new unit of conversion. We are without authority to do so.

Treaty negotiation and proposal is the province of the executive and ratification is the exclusive province of the United States Senate. U.S. Const. art. II, § 2, cl. 1; *Doe ex dem. Clark et al. v. Braden*, 16 How. 635, 656-57

(1853). While federal courts are necessarily called upon to interpret treaties, *The Federalist* No. 3 (J. Jay) (Rossiter ed. 1961); see also *id.* No. 80 (A. Hamilton), they must observe the line between treaty interpretation on the one hand and negotiation, proposal and ratification on the other. See *Baker v. Carr*, 369 U.S. 186, 211-12 (1961). To be sure, great difficulty may arise in ascertaining where that line is drawn and when it has been crossed.²⁶ See, e.g., *Goldwater v. Carter*, 444 U.S. 996 (1979). However, selection of a unit of conversion and the level of value of a limitation on liability is plainly a matter to be negotiated by the parties, as the history of the Convention demonstrates.

While international disarray as to the proper unit of conversion under the Convention alone might not disable us from enforcing a new unit, such a unit must be selected either through treaty ratification by the Senate or by legislation passing both Houses of the Congress. The repeal of the Par Value Modification Act was an explicit abandonment of the previously established unit of conversion. While Congress may not have focused explicitly upon the Convention in repealing that Act, its purpose, abandonment of a price which was out of touch with economic reality, plainly encompasses use of that price to

²⁶ Given the lack of an internationally agreed upon standard of conversion, it might be argued that the Convention has been abrogated. However, treaties involve international obligations entered into by coordinate branches of the government and it is not the province of courts to declare treaties abrogated or to afford relief to those (including the parties) who wish to escape their terms. These are not matters for "judicial cognizance." *Whitney v. Robertson*, 124 U.S. 190, 194 (1887); see also *Terlinden v. Ames*, 184 U.S. 270 (1901). They belong to the executive and legislative departments because they are more properly the domain of "diplomacy and legislation, . . . not . . . the administration of laws." *Whitney v. Robertson*, 124 U.S. at 195.

convert judgments to United States currency values. Congress thus abandoned the unit of conversion specified by the Convention and did not substitute a new one. Substitution of a new term is a political question, unfit for judicial resolution. We hold, therefore, that the Convention's limits on liability for loss of cargo are unenforceable in United States Courts.²⁷

CONCLUSION

This ruling is prospective and will apply only to events creating liability occurring 60 days from the issuance of the mandate in this case. Prospective effect is compelled by the fact that this is the first case in which a court has declined to enforce the Convention's limits on liability. The parties assumed our power to select a new unit and thus our "resolution was not clearly foreshadowed." *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106 (1971). Parties to transactions covered by the Convention should have time to adjust their affairs to this ruling. *Cf. Northern Pipeline Construction Co. v. Marathon Pipeline Co.*, 50 U.S.L.W. 4892 (U.S. June 28, 1982) (judgment holding Bankruptcy Act unconstitutional stayed until October 4, 1982). As to events occurring before that date, we hold that the last official price of gold shall be used to calculate the limits on liability. Because of both the CAB ruling discussed above and the lack of alternatives, air carriers, at least in this country, have relied on the last official price of gold. All carriers have thus filed tariffs

²⁷ The Convention establishes liability as well as limits it. Note 2, *supra*. Our holding is limited solely to the unenforceability of the limits and we express no view as to the severability of those limits from the rest of the Convention.

that comply with that standard and substantial "injustice and hardship" would result were they not allowed time to reformulate those tariffs. Other parties may continue to protect themselves through insurance.

Affirmed.

Docket Number

82-7012

**United States Court of Appeals
FOR THE SECOND CIRCUIT**

FRANKLIN MINT CORPORATION, *et al.*,

Plaintiffs-Appellants,

v.

TRANS WORLD AIRLINES, INC.,

Defendant-Appellee.

NOTICE OF MOTION

for Stay of Issuance of Mandate

Motion By:

CURTIS, MALLET-PREVOST, COLT & MOSLE

Robert S. Lipton, Esq.

(212) 696-6045

Has a request of opposing counsel for consent been refused?

☒ Yes

☐ No

Has service been effected?

☒ Yes

☐ No

Is oral argument desired?

☐ Yes

☒ No

(Substantive motions only)

Requested return date:

(See Second Circuit Rule 27(b))

Date of argument of appeal, if scheduled:

Judge or agency whose order is being appealed:

OPPOSING COUNSEL: *(Name and tel. no. of attorney in charge)*

WAESCHE, SHEINBAUM & O'REGAN, P.C.

John R. Foster, Esq.

(212) 227-3550

Brief statement of the relief requested: Order staying the issuance of mandate in this case pending the filing by defendant-

appellee Trans World Airlines, Inc. ("TWA") of a petition for certiorari in the Supreme Court and until final disposition therein of the case.

Previous requests for similar relief and disposition: None.

Statement of the issue(s) presented by this motion: Whether an order staying issuance of the mandate in this case should be entered since TWA expects and intends to make proper and timely application to the Supreme Court of the United States by a petition for writ of certiorari for review of certain aspects of the decision and judgment of this Court in this case.

Brief statement of the facts (with page references to the moving papers): The relevant factual background is set forth at paragraphs 2 and 3 of the Affidavit of John N. Romans, sworn to on December 6, 1982, and submitted in support of this motion.

Summary of the argument (with page references to the moving papers): Pursuant to the provisions of Section 2101(f), Title 28 U.S.C. and Rule 41(b) of the Federal Rules of Appellate Procedure, an order should be entered staying issuance of the mandate in this case on the ground that it is the *bona fide* intention of TWA to make proper application to the Supreme Court within the time allowed by law for a writ of certiorari. The grounds upon which TWA's petition for certiorari will be based are set forth at paragraph 5 of the Romans Affidavit mentioned above.

12/7/82

Date

ROBERT S. LIPTON

The name signed must be printed beneath

Robert S. Lipton

Attorney for Defendant-Appellee.

ORDER

IT IS HEREBY ORDERED
that the motion be and it hereby
is *granted*

JAMES L. OAKES

Hon. James L. Oakes

RICHARD J. CARDAMONE

Hon. Richard J. Cardamone

RALPH K. WINTER

Hon. Ralph K. Winter

December 17, 1982

United States Court of Appeals

SECOND CIRCUIT

No. 82-7012

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the first day of December one thousand nine hundred and eighty-two.

FRANKLIN MINT CORPORATION, FRANKLIN MINT LIMITED, and MCGREGOR, SWIRE AIR SERVICES LIMITED,

Plaintiffs-Appellants,

v.

TRANS WORLD AIRLINES, INC.,

Defendant-Appellee.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the defendant-appellee, Trans World Airlines, Inc.,

Upon consideration by the panel that heard the appeal, it is
ORDERED that said petition for rehearing is **DENIED**.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge on the panel that heard the appeal and that no such judge has requested that a vote be taken thereon.

A. Daniel Fusaro, *Clerk*

by:

FRANCIS X. GINDHART

Francis X. Gindhart
Chief Deputy Clerk

United States District Court
SOUTHERN DISTRICT OF NEW YORK

MEMORANDUM AND ORDER
81 Civ. 1700 (WK)

FRANKLIN MINT CORPORATION, FRANKLIN MINT LIMITED,
and MCGREGOR, SWIRE AIR SERVICES, LIMITED,

Plaintiffs,

-against-

TRANS WORLD AIRLINES, INC.

Defendant.

Whitman Knapp, D.J.

On March 23, 1979, plaintiff Franklin Mint Corporation ("Franklin") delivered to defendant Trans World Airlines, Inc. ("TWA") for carriage from Philadelphia, Pennsylvania to London's Heathrow Airport, four packages weighing some 714 pounds. Although the packages are said to have contained a large quantity of valuable coins, Franklin made no special declaration of value at the time of delivery. TWA charged Franklin \$544.96 for the shipment. The four packages never arrived at their destination, and Franklin brought this action to recover their full value, which it fixes at \$250,000. The parties agree that this action is governed by the terms of the Warsaw Convention, and that TWA is liable for the loss. Before us is a motion by TWA for partial summary judgment as to the extent of its liability. We grant that motion in part and deny it in part.

Article 22 of the Warsaw Convention provides that, unless a special declaration of value is made at the time of delivery, a shipper's liability for checked baggage and goods is limited to the equivalent of 250 francs per kilogram. Article 22 states, moreover, that this limitation of 250 francs:

"shall be deemed to refer to the French franc consisting of 65½ milligrams of gold at the standard of fineness of nine

hundred thousandths [the so-called Poincare franc]. These sums may *be converted into any national currency in round figures.*" (Emphasis added.)

Counsel for TWA, in an extraordinarily lucid and comprehensive brief, has suggested three possible bases for the calculation converting the Article 22 limitation into United States dollars: (1) the Special Drawing Right ("SDR"), used by members of the International Monetary Fund ("IMF") as a unit of account; (2) the last official price of gold in the United States; and (3) the exchange value of the current French franc. Counsel for Franklin, in an equally able brief, suggests a fourth possibility: the free market price of gold.

Were we writing on a clean slate, we would find the arguments in favor of the first of TWA's suggestions (the SDR) most persuasive. However, TWA's second suggestion (the last official price of gold in the United States) has—arguably, at least—been espoused by the Civil Aeronautics Board ("CAB"), the government agency most intimately concerned with the transaction at hand. It therefore comes as close as anything to constituting a governmental interpretation of the Article 22 limitation. Also, it is used by all domestic carriers—including TWA—in calculating the dollar value of the Article 22 limitation printed on their tariffs. It would seem to follow that the parties intended to adopt the last official price of gold as the basis for converting the Article 22 limitation into dollars in the instant case.

Beyond saying the foregoing we can, since there are no disputed issues of fact upon which a finding by us is required, see no purpose to be served by delaying a decision while we seek to put in our own words the arguments so cogently expressed by counsel for TWA. Accordingly, we simply adopt those arguments to the extent that they support our conclusion that the conversion should be premised on the last official price of gold in the United States.

Let counsel for TWA submit a proposed order on ten days' notice. As we understand the stipulation of the parties, such an order would in effect direct that judgment be entered for plaintiff in the amount of \$6,475.98 plus interest and costs, a result which would permit immediate appeal from this order.

SO ORDERED.

Dated: New York, New York
November 6, 1981

.....
Whitman Knapp, U.S.D.J.

United States District Court
SOUTHERN DISTRICT OF NEW YORK

ORDER

81 Civ. 1700 (WK)

FRANKLIN MINT CORPORATION, FRANKLIN MINT LIMITED
and MCGREGOR, SWIRE AIR SERVICES, LIMITED,

Plaintiffs,

v.

TRANS WORLD AIRLINES, INC.,

Defendant.

APPEARANCES

For Plaintiffs:

WAESCHE, SHEINBAUM &

O'REGAN

120 Broadway

New York, New York 10271

John Foster, Esq.

For Defendants:

CURTIS, MALLET-PREVOST,

COLT & MOSLE

100 Wall Street

New York, New York 10005

John R. Romans, Esq.

WHITMAN KNAPP, D.J.

The first sentence of the second paragraph of our November 6, 1981 Memorandum and Order is hereby amended to read:

"Article 22 of the Warsaw Convention provides that, unless a special declaration of value is made at the time of a delivery, a carrier's liability for checked baggage and goods is limited to the equivalent of 250 francs per kilogram."

SO ORDERED.

Dated: New York, New York

December 18, 1981

.....
Whitman Knapp, U.S.D.J.

United States District Court
SOUTHERN DISTRICT OF NEW YORK

81 Civ. 1700 (WK)
ORDER AND JUDGMENT

FRANKLIN MINT CORPORATION, FRANKLIN MINT LIMITED
and MCGREGOR, SWIRE AIR SERVICES, LTD.,

Plaintiffs,

— *against* —

TRANS WORLD AIRLINES, INC.,

Defendant.

For the reasons stated in the Memorandum and Order of this Court, dated November 6, 1981, it is

ORDERED ADJUDGED AND DECREED: that the maximum liability herein of defendant Trans World Airlines, Inc. shall be determined under Article 22 of the Convention for the Unification of Certain Rules Relating to International Transportation by Air, 49 Stat. 3000 *et. seq.* (1934), T.S. 876, *reprinted in* 49 U.S.C. § 1502 note (1970), by a conversion factor premised on the last official price of gold in the United States, and it is

FURTHER ORDERED, that in accordance with the foregoing conversion factor, final judgment shall be entered for plaintiffs in the amount of \$6,475.98, plus interest and costs.

Dated: New York, New York
December 3, 1981

WHITMAN KNAPP

WHITMAN KNAPP
U.S.D.J.

JUDGMENT ENTERED 12/4/81

RAYMOND F. BURGHARDT

Clerk

81 Civ. 1700 (WK)

United States District Court
SOUTHERN DISTRICT OF NEW YORK

FRANKLIN MINT CORPORATION, FRANKLIN MINT LIMITED,
and MCGREGOR, SWIRE AIR SERVICES LIMITED,

Plaintiffs,

—against—

TRANS WORLD AIRLINES, INC.,

Defendant.

NOTICE OF MOTION; AFFIDAVIT

MOTION DENIED

December 16, 1981

WHITMAN KNAPP

Whitman Knapp
U.S.D.J.

United States District Court
SOUTHERN DISTRICT OF NEW YORK

81 Civ. 1700 (WK)

NOTICE OF MOTION

FRANKLIN MINT CORPORATION, FRANKLIN MINT LIMITED,
and MCGREGOR, SWIRE AIR SERVICES LIMITED,

Plaintiffs,

—against—

TRANS WORLD AIRLINES, INC.,

Defendant.

PLEASE TAKE NOTICE that on the Court's Memorandum and Order dated November 6, 1981; on the Court's Order and Judgment dated December 3, 1981; on the affidavit sworn to by John R. Foster on December 14, 1981, attached hereto; on the memorandum of law submitted herewith; and on all the prior pleadings and proceedings had in this action, the undersigned will move this Court before the Honorable Whitman Knapp, United States District Judge, at the United States Courthouse, Foley Square, New York, New York, on January 8, 1982, at 2:00 p.m., or as soon thereafter as counsel may be heard, for an order pursuant to rule 59(e) of the Federal Rules of Civil Procedure amending the Court's Order and Judgment of December 3, 1981, by determining defendant Trans World Airlines, Inc.'s liability

under Articles 18 and 22 of the Warsaw Convention in accordance with the free-market price of gold, and for such other and further relief as to the Court may seem just and equitable.

Dated: New York, New York
December 14, 1981

WAESCHE, SHEINBAUM & O'REGAN, P.C.
Attorneys for Plaintiffs

By: JOHN R. FOSTER

John R. Foster
120 Broadway, Suite 1825
New York, New York 10271
(212) 227-3550

CONSTITUTION OF THE UNITED STATES

Section 2. The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; he may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices, and he shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.

He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.

**CONVENTION FOR UNIFICATION OF CERTAIN
RULES RELATING TO INTERNATIONAL
TRANSPORTATION BY AIR**

Article 22

(1) In the transportation of passengers, the liability of the carrier for each passenger shall be limited to the sum of 125,000 francs. Where, in accordance with the law of the court to which the case is submitted, damages may be awarded in the form of periodical payments, the equivalent capital value of the said payments shall not exceed 125,000 francs. Nevertheless, by special contract, the carrier and the passenger may agree to a higher limit of liability.

(2) In the transportation of checked baggage and of goods, the liability of the carrier shall be limited to a sum of 250 francs per kilogram, unless the consignor has made, at the time when the package was handed over to the carrier, a special declaration of the value at delivery and has paid a supplementary sum if the case so requires. In that case the carrier will be liable to pay a sum not exceeding the declared sum, unless he proves that that sum is greater than the actual value to the consignor at delivery.

(3) As regards objects of which the passenger takes charge himself, the liability of the carrier shall be limited to 5,000 francs per passenger.

(4) The sums mentioned above shall be deemed to refer to the French franc consisting of 65½ milligrams of gold at the standard of fineness of nine hundred thousandths. These sums may be converted into any national currency in round figures.

Order 74-1-16

**UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
WASHINGTON, D. C.**

Docket 26274

**Adopted by the Civil Aeronautics Board
at its office in Washington, D. C.
on the 3rd day of January, 1974**

**IN THE MATTER OF WARSAW CONVENTION LIABILITY
LIMITATIONS AS EXPRESSED IN U. S. DOLLARS**

ORDER

Section 221.38(j) of the Board's Regulations requires U. S. and foreign air carriers which avail themselves of the limits of liability to passengers provided in the Warsaw Convention (49 Stat. 3000; T.S. 876) to include in their tariffs, *inter alia*, a statement as to the amount of the liability limits of the Convention stated in dollars. These provisions of the tariffs, as well as those setting forth limitations of liability under the Convention with respect to baggage and property, restate the applicable law and serve to advise the public of the Convention limitations on their right of recovery for death, or injury or loss or damage to baggage and property.

The liability limits in the Warsaw Convention are set forth in terms of gold francs so that as long as the value of the dollar in terms of gold remained constant, no change was required in the dollar amount of the liability limits contained in the tariffs. However, by Order 72-6-7 adopted June 2, 1972, the Board directed the carriers to revise their tariffs to reflect the devaluation of the dollar in terms of gold from \$35 per ounce to approximately \$38 which took place effective May 8, 1972, and such

revisions have been made. On September 21, 1973, Public Law 93-110 was enacted, further devaluating the U. S. dollar to approximately \$42.22 per ounce of gold effective October 18, 1972. As a result, the minimum liability limits specified in Order 72-6-7 and the tariffs currently on file with the Board no longer meet the minimum liability limits of the Convention and a revision of the tariffs is necessary to accurately reflect such limits in dollars.¹

In view of the foregoing and of all other relevant matters, the Board finds and concludes:

1. That the dollar limitations stated in the presently effective tariffs of the respondent air carriers and foreign air carriers no longer meet the minimum liability requirements of the Warsaw Convention for "international transportation" or of the Hague Protocol² and "international carriage" as defined therein.

2. That, in this circumstance, such tariff limitations are inconsistent with the applicable law as set forth in the Convention or the Protocol, and the tariff filing requirements in Section 403 of the Federal Aviation Act of 1958, and Part 221 of the Board's Regulations and they must be canceled.

1. With respect to their liability to passengers, this order will affect only a small proportion of the U. S. and foreign air carriers. Most carriers engaged in international transportation by air involving journeys to or from the United States adhere to the Montreal Agreement (Agreement CAB 18900 approved by Order E-23680 dated May 13, 1966, 31 F.R. 7302) pursuant to which they have filed tariffs providing for a \$75,000 limit of liability for death or injury to passengers. Since this limit is stated in terms of U. S. dollars, it is unaffected by the change in the gold value of the dollar.

2. The Hague Protocol of 1955 doubles the Warsaw liability limit for passengers, but since the United States has not signed or adhered to the Protocol, its provisions do not normally apply with respect to air transportation.

3. That the minimum acceptable figures in United States dollars for liability limits applicable to "international transportation" and "international carriage" are as follows:

<u>Convention and Protocol Minimum Liability</u>	<u>Actual</u>	<u>Rounded*</u>
125,000 francs (per passenger, Convention only)	\$10,002.90	\$10,000.00
250,000 francs (per passenger, Hague Protocol only)	20,005.80	20,000.00
5,000 francs (per passenger for unchecked baggage)	400.116	400.00
250 francs (per kilogram for checked baggage and goods)	20.00580	20.00
250 francs (per kilogram on a per-pound basis)	9.07460	9.07

Accordingly, pursuant to the provisions of the Federal Aviation Act of 1958, particularly Sections 204(a), 403, and 1002 thereof,

IT IS ORDERED THAT:

1. The carriers named in Appendix A, attached hereto, shall revise all liability limitations which may be applicable to "international transportation" or "international carriage" as defined in the Convention or the Protocol which are inconsistent with the dollar amounts set forth herein so as to conform with such amounts.

2. The tariff cancellations directed in ordering paragraph 1 above shall become effective on or before February 6, 1974, on not less than 10 days' notice.

3. Article 22 of the Warsaw Convention permits the liability limits specified therein in gold francs to be converted into any national currency in round figures. The Board is permitting the round dollar amounts set forth in this order to be filed in the tariffs for purpose of convenience. This order is not intended to prohibit carriers from specifying the actual dollar equivalents in their tariffs as some of them do at the present time. The dollar values herein are calculated in accordance with the criteria detailed in Order 72-6-7.

3. That copies of this order shall be served on the air carriers and foreign air carriers named in Appendix A.

This order will be published in the Federal Register.

By the Civil Aeronautics Board:

EDWIN Z. HOLLAND
Secretary

(SEAL)

APPENDIX A

U.S. CERTIFICATED SCHEDULED AIR CARRIERS

Airlift International, Inc.
Alaska Airlines, Inc.
Allegheny Airlines, Inc.
Aloha Airlines, Inc.
American Airlines, Inc.
Aspen Airways, Inc.
Braniff Airways, Inc.
Chicago Helicopter Airways, Inc.
Continental Air Lines, Inc.
Delta Air Lines, Inc.
Eastern Air Lines, Inc.
Frontier Airlines, Inc.
Hawaiian Airlines, Inc.
Hughes Air Corp., d/b/a Hughes Airwest
Kodiak-Western Alaska Airlines, Inc.
Los Angeles Airways, Inc.
National Airlines, Inc.
New York Airways, Inc.
North Central Airlines, Inc.
Northwest Airlines, Inc.
Ozark Air Lines, Inc.
Pan American World Airways, Inc.
Piedmont Aviation, Inc.
Reeve Aleutian Airways, Inc.
SFO Helicopter Airlines, Inc.
Seaboard World Airlines, Inc.
Southern Airways, Inc.
Texas International Airlines, Inc.
The Flying Tiger Line Inc.
Trans World Airlines, Inc.
United Air Lines, Inc.
Western Air Lines, Inc.
Wien Air Alaska, Inc.

Wright Air Lines, Inc.

U.S. SUPPLEMENTAL AIR CARRIERS

Capitol International Airways, Inc.
Johnson Flying Service, Inc.
McCulloch International Airlines, Inc.
Modern Air Transport, Inc.
Overseas National Airways, Inc.
Royal International Airlines
Saturn Airways, Inc.
Southern Air Transport, Inc.
Standard Airways, Inc.
Trans International Airlines, Inc.
Universal Airlines, Inc.
World Airways, Inc.

U.S. AIR TAXI OPERATORS*

Aeromech, Inc.
Air East, Inc.
Air Indies Corporation
Air New England, Inc.
Air North, Inc.
Air South, Inc.
Air Wisconsin, Inc.
Alaska Aeronautical Industries, Inc.
Altair Airlines, Inc.
Antilles Air Boats, Inc.
Apache Airlines, Inc.
Apollo Aviation, Inc.
Atlantic City Airlines, Inc.
Bar Harbor Airway, Inc.
Cascade Airways, Inc.
Cochise Airlines, Inc.

* Includes only air taxi operators participating in tariffs for through rates, fares, and charges filed jointly with certificated air carriers.

Combs Airways, Inc.
 Command Airways, Inc.
 Commuter Airlines, Inc.
 Crown Airways, Inc.
 Downeast Airlines, Inc.
 Execuair, Inc.
 Executive Airlines, Inc.
 Fischer Bros. Aviation, Inc.
 Florida Airlines, Inc.
 Golden West Airlines, Inc.
 Henson Aviation, Inc.
 Mackey International Air Commuter
 Marco Island Airways, Inc.
 Metroflight Airlines, Inc., d/b/a
 Houston Metro Airlines
 Midstate Air Commuter
 Monmouth Airlines, Inc.
 Pennsylvania Commuter Airlines,
 Div. of Clark Aviation Corp.
 Pocono Airlines, Inc.
 Provincetown-Boston Airline, Inc., d/b/a
 Provincetown-Boston Airline or Naples Airlines
 Puerto Rico International Airlines, Inc.
 Ransome Air, Inc.
 Rio Airways, Inc.
 Royale Airlines, Inc.
 Sedalia-Marshall Boonville Stage Line, Inc.
 Shawnee Airlines, Inc.
 L. B. Smith
 Southeast Airlines, Inc.
 Suburban Airlines, Inc., a subsidiary of
 Reading Aviation Service, Inc.
 Swift Air Lines, Inc.
 Travel Air Aviation, Inc.
 Verco Air Service, Inc.
 Winnepesaukee Aviation, Inc.

U.S. INDIRECT AIR CARRIERS

(Airfreight Forwarders and Air Express)

Add Airfreight Corp.
Aero Special Air Freight, Inc.
Air Cargo Expeditors, Inc.
Air Cargo Specialists, Inc.
Air Freightways Corporation
Air-Land Freight Consolidators, Inc.
Air-Land Transport, Inc.
Air Overseas Corporation
Airport Packers, Inc., d/b/a
 Airport Packers & Forwarders
Air Progress, Inc.
Air-Sea Forwarders, Inc.
Air Van Lines, Inc.
Airborne Freight Corporation
 (a Delaware corporation)
The "AL" Naish Moving and Storage Company,
 A Corporation
Alas Ibero Americanas, Inc.
Alberti Van & Storage Co., Inc., d/b/a
 Mov Air
All-Airtransport, Inc.
All Carrier Transport, d/b/a
 ACT Air Freight
All Hawaii Cargo Consolidators, Inc., d/b/a
 A-One Air Freight
Allied Van Lines, Inc.
Allstates Air Cargo, Inc.
Ambassador Air Freight Corp.
Amerford International Corp., d/b/a
 Amerford Air Cargo
American Ensign Van Service, Inc.
American Red Ball Transit Co., Inc.
American Van & Storage, Inc.
Amerpole Air Freight, Inc.

Anthony H. Osterkamp, Jr., d/b/a
Osterkamp Trucking
Apex Air Freight, Inc.
Apollo Air Freight Corporation
Armand J. Donati
Around the World Air Freight, Inc.
Anthony S. Arrico and Robert P. Landy, d/b/a
R. I. Air Freight Forwarders
Associated Air Freight, Inc.
(a Virginia corporation)
Aero Mayflower Transit Company, Inc.
Astro Air Express, Inc.
Astron Forwarding Company, Inc.
Atlas Van Lines International Corp.
Aztec Transportation Co., Inc., d/b/a
Aztec Air Freight
B & G Trucking, Inc.
Bader Bros. Van Lines, Inc.
Baker International Warehouse, Inc., d/b/a
Baker Air Cargo
Beacon Shipping Co., Inc.
Behring International, Inc.
Bekins International Lines, Inc.
Bellair Expediting Service, Inc.
Ben-Lee Motor Service Co., d/b/a
Mitchell Air Dispatch
Bennett & Taylor Trans., Inc.
J. E. Bernard & Co., Inc.
(a New York corporation)
Black & Geddes, Inc.
Bor-Air Freight Co., Inc.
Philip C. Borden, d/b/a
Borden Trucking
Brake Air Freight, Inc.
Bruce Transfer Corp.
Burlington Northern Air Freight, Inc.

A. F. Burstrom & Sons, Inc.
 W. J. Byrnes and Company of New York, Inc.
 Air Freight, Inc.
 C&L Freight Lines, Inc., d/b/a
 Commerce Air Freight
 C-M-D Transport, Inc., d/b/a
 C-M-D Air Forwarders
 Cal-Air Forwarders, Inc.
 Cal-Hawaiian Freight, Inc.
 California Delivery Service (A Corp.)
 Cargo Courier Air Freight, Inc.
 Cargoair Forwarders, Inc.
 Carmichael International Service, d/b/a
 CIS Oceanair Services
 Carolina Freight Carriers Corporation
 Willis L. Carr and Charles D. Weist, d/b/a
 Cates Carr Go
 Cartwright International Van Lines, Inc.
 Castelazo & Associates
 Century Air Freight, Inc.
 CF Air Freight, Inc.
 Christman Corporation, d/b/a Christman Air Freight
 Circle Airfreight Corp.
 Clipper Express Company, d/b/a "Sky Ho!" Air Freight Division
 Columbia Air/Frate, Inc.
 Columbia Export Packers, Inc.
 Com-Air Freight, Inc., d/b/a Comet Air Freight
 Commercial Air-Frate, Inc.
 Common Market Forwarders, Inc.
 Connecticut Air Freight, Inc.
 Continental Forwarders, Inc. (a Delaware corporation)
 Corsair Air Cargo System, Inc.
 F. X. Coughlin Co.
 Crown Air Freight Corp.
 D.J.C. Corporation, d/b/a Jones Air Freight
 Data Air Distribution System Co., Inc.

Davidson Forwarding Company
Dean Forwarding Co., Inc.
Delcher Intercontinental Moving Service, Inc.
Woodrow W. De Witt, d/b/a De Witt Freight Forwarding
Distribution Centers, Inc., d/b/a Alpha Air Freight
District Moving & Storage, Inc., d/b/a District Containerized
Express
Domestic Air Express, Inc.
Door to Door International, Inc.
Frank P. Dow Co., Inc. (a Washington corporation)
Bruce Duncan Co., Inc., d/b/a Bruce Duncan Cargo
Emery Air Freight Corporation
Empire Carriers Corp., d/b/a Entico Air Freight Service
Empire Foreign Air Forwarders, Inc.
Engel Brothers, Inc.
Enterprise Shipping Corp.
Equine Express, Inc.
Euro-American Air Freight Forwarding Co., Inc.
Express Forwarding and Storage Co., Inc.
5 Star Air Freight Corporation
Fernstrom Storage and Van Company
Flying Horse Air Freight, Inc.
Footner and Company, Inc., d/b/a Rennie Footner Air Express
Service
Foreign Trade Export Packing Corp., d/b/a Foreign Trade
Export Company
44 Air Express Systems, Inc.
Fort Pitt Consolidators, Inc.
Forwardair, Inc.
Four Winds Forwarding, Inc.
The Francesco Parisi Forwarding Corporation, d/b/a Parisi
Airfreight
Fresh Air, Inc., d/b/a Fresh Air Cargo
Fritz Air Freight
Frontier Freight Forwarders, Inc., d/b/a Frontier Freight
Consolidators

Furman Air Freight Corp.
 G. & H. Transportation, Inc., d/b/a G. & H. Air Freight
 Gateway Aviation Co., Inc.
 General Air Freight Corp.—Domestic
 General Air Freight Corp.
 General Transpac System, d/b/a GTS Airfreight
 Genex Airfreight, Inc.
 Gilbert Air Transport Corp.
 Global Forwarding, Inc.
 Globe Shipping Co., Inc.
 Gold Wings Ltd.
 Golden Gate Air Freight, Inc.
 Graf Air Freight, Inc.
 Arnold S. Grant, d/b/a LeMark Air Freight Service
 Greene Air International, Inc.
 HC & D Forwarders International, Inc.
 Hallmark Cargo Services, Inc.
 Hall Expediting, Inc.
 Harle Consolidators International (HARLE-CON), A division
 of Harle Services, Inc.
 Harlo-Air Cargo Brokers, Inc.
 Hemisphere Air Freight, Inc.
 Home-Pack Transport, Inc.
 Hop Air Freight Forwarders, Inc.
 I & T Air Freight Forwarders, Inc.
 Imperial Air Freight Service, Inc. (a New Jersey corporation)
 Imperial Van Lines International, Inc.
 Industrial Air Cargo, Inc.
 Inter-Maritime Forwarding Co., Inc.
 International Air Courier, Inc.
 International Customs Service, Inc.
 International Export Packers, Inc.
 Interstate Dress Carriers, Inc.
 Intra-Mar Shipping Corporation
 Jet Air Freight
 Jet Forwarding, Inc.

Joyce Expediting Service, Inc.
Karevan, Inc.
Karr, Ellis & Co., Inc.
Kerner Trucking Service, Inc., d/b/a KTS Air Freight Key Air
Freight, Inc.
Kimberlin Air Freight Corp.
King Van Lines, Inc.
Bernard Klainberg, d/b/a Berklay Air Services Corp.
L.T.C. Air Cargo, Inc.
La Belle Air Freight, Inc.
Landair Corporation
Richard Thomas Light, d/b/a Westchester Air Freight
Loomis Courier Service, Inc.
Luigi Serra, Inc.
John J. McCabe Agency, Inc.
McLean Cargo Specialists, Inc.
Maris Van & Storage, d/b/a Maris Air Transport Division
Mark IV Air Freight, Inc.
Mercury Motor Express, Inc. (Mercury)
New England Air Lift, Inc.
Herb B. Meyer & Co., Inc.
Midland Forwarding Corporation, d/b/a ABC Air Freight
Missouri Pacific Air Freight, Inc.
Monumental-Security Storage Co.
Murray Air Freight, Inc.
Murty Bros. Agency, Inc.
Mustang Trucking Company, Inc., d/b/a Mustang Air Freight
National Movers Co., Inc.
National Van Lines, Inc.
Nelsonair International, Inc.
Neptune World-Wide Moving, Inc.
Network Courier Service
Alex Nichols Agency, Inc..
North American Van Lines, Inc.
Northern Air Freight, Inc.
Novo Airfreight Corp.

Novo International Corp., d/b/a Novo International Airfreight
O.N.C. Forwarding, d/b/a Rocor Air Freight
Oceanic Forwarders Company, d/b/a Air-Oceanic Shippers
H. G. Ollendorff, Inc.
P.I.E. Air Freight Forwarding, Inc.
Pacific Alaska Forwarders, Inc., d/b/a Arctic Air Freight
Pacific Delivery System
Panalpina Airfreight, Inc., d/b/a Panalpina Airfreight System
Par Avion Corporation
Paulssen & Guice, Ltd.
Performance by Air, Inc.
Petry & Co.'s Foreign Express (a Division Trans-World Shipping
Corporation)
Philadelphia Air Consolidators Assn., Inc.
Pilot Air Freight Corp.
Presto Delivery Service, Inc.
Prideair Freight, Ltd.
Priority Air Freight, Inc.
Profit by Air, Inc.
Pegasus Air Transport Co.
Perfect Pak Company
Puerto Rican Forwarding Company, d/b/a Active Air Freight
Qwikway Trucking Co., d/b/a Qwik Air
Railway Express Agency, Incorporated
Ramar Air Freight Corp.
Randy International Ltd.
Rapidair Freight
Reilly Expediting Service, Inc.
Republic Airmodal, Inc.
Republic Van and Storage Co., Inc.
Rex Air Freight, Inc.
Right-O-Way, Inc., d/b/a Right-O-Way Air Freight
Royal Air Freight Corp.
Rozay's Transfer
Saber Air Freight, Inc.
Santa Fe Air Freight Company

Satellite Air Freight, Inc.
 Satin Air Freight, Inc.
 Robert L. Schley, d/b/a Schley Shipping Company
 Schreiber Air Freight, Inc.
 Seariders, Inc.
 Security Van Lines, Inc.
 Senderex Cargo Company, Inc.
 Sentry Air Freight Corp.
 Service By Air Freight Forwarders, Inc.
 Service Air Cargo
 Sesko International, Inc.
 Set Air Freight, Inc.
 Shulman Air Freight, Inc.
 Signalair, Inc.
 Sincro Inter National
 Sky-Hawk Forwarders, Inc.
 Skyline Air Freight, Inc.
 Skymaster, Inc.
 J. D. Smith Inter-Ocean, Inc.
 Southern Pacific Air Freight, Inc.
 Star World Wide Forwarders, Inc.
 Starck Van Lines, Inc.
 Suarez Shipping Services, Inc.
 Suddath Van Lines, Inc.
 Sunpak Movers, Inc.
 Superior Fast Freight, d/b/a Aero-Ex
 Supreme Air Freight Corp.
 Surf-Air, Inc.
 H. E. Sutton Forwarding Co., Inc.
 Swift Home-Wrap, Inc.
 T.F.C. Air Freight, Inc.
 Tally's Truck Line
 Target Air Freight, Inc.
 Three-B Freight Service, Inc.
 Towne International Forwarding Inc.
 Trans-Air Freight System, Inc.

Transcon Lines
 Transport Express Inc.
 Transpor Trade Corporation
 Trans-Pacific Air Cargo
 Tuya International Corp.
 United News Transportation Co.
 United Parcel Service Co.
 United Van Lines, Inc.
 U. S. Van Lines, Inc.
 Usair Freight, Inc.
 Vanpac Carriers, Inc.
 Ven-Air Service, Inc.
 Virgil's Delivery Service, Inc., d/b/a Virgil's Air Cargo
 Von Der Ahe Van Lines, Inc.
 B. Von Paris & Sons, Inc.
 WTC Air Freight
 WTC Forwarding Corp.
 Benjamin H. Walder & Rubin Konlon, d/b/a Chicagoland Air
 Freight
 Wallkill Air Freight Corporation, d/b/a Atlas Air Cargo
 Wells Fargo Air Express, Inc.
 Wheaton Van Lines, Inc.
 James G. Wiley Co.
 Wilson Air Freight, Inc.
 Wings and Wheels Express, Inc.
 Wings and Wheels Express, Inc., d/b/a Air Express
 International
 Wits, Inc., d/b/a Wits Air Freight
 World Trade Air Freight Services, Inc.
 Wright Air Freight Corp.
 W. R. Zanes & Co. of La. Inc., d/b/a Zanes Inter-Air
 Consolidators

FOREIGN INDIRECT AIR CARRIERS

Willy Peter Daetwyler, d/b/a Interamerican Airfreight Co.
Kinki Nippon Routist Co. (Japan), d/b/a Kintetsu World
Express, Inc. (U.S.A.)
Kuehne & Nagel (Germany), d/b/a Kuehne & Nagel Air
Freight, Inc.
Lep Transport, Ltd. (United Kingdom), d/b/a Lep Transport,
Inc. (U.S.A.)
McGregor, Swire Air Services Limited, Inc. (U.K.)
Mitsui Air & Sea Service Co., Ltd. (Japan), d/b/a Mitsui Line
Travel Service of America, Inc. (U.S.A.)
Nippon Express Co., Ltd.
Pandair Freight Limited (U.K.)
Union Speditions—Gesellschaft m.b.H. Union Air Transport
Yusen Air & Sea Service Company Limited (Japan), d/b/a
Yusen Air & Sea Service (U.S.A.) Incorporated

APPENDIX A

FOREIGN AIR CARRIERS**

Adastra Aviation Limited
Aden Airways Limited
Aer Lingus Teoranta
Aerlinite Eireann Teoranta
Aereo Fletes Internacionales, S.A. (AFISA)
Aero Lineas Flecha Austral Limitada
Aero Spacelines, Inc.
Aero Trades (Western) Ltd.
Aerocosta, S.A.
Aerolineas Argentinas
Aerolineas El Salvador, S.A.
Aerolineas Del Ecuador, S.A.
Aerolineas Peruanas, S.A.
Aerolinee Itavia—S.p.A.
Aeromar C. por A.
Aeronaves de Mexico, S.A.
Aeronaves del Ecuador, S.A.
Aeronaves del Peru, S.A.
Aerotransportes Entre Rios S.R.L.
Aerovias Colombianas Limitada (ARCA)
Aerovias Condor de Colombia Ltda.
Aerovias Lansa, S. de R.L.
Aerovias Nacionales de Colombia, S.A.
Aerovias Quisqueyana, C. por A.
Aerovias Venezolanas, S.A.
Air Afrique
Air BVI Limited
Air Canada
Air Ceylon, Limited
Air Haiti, S.A.

** Includes carriers by air of foreign countries which do not operate to/from the United States, but participate in joint tariffs in air transportation.

Air-India
 Air Jamaica (1968) Limited
 Air Liban (Lignes Aeriennes Libanaises)
 Air Malawi Limited
 Air Nauru
 Air New Zealand Limited
 Air Rhodesia Corporation
 AIR-SIAM Air Company Limited
 AIR-VIETNAM
 Air Zaire
 Airlines Jersey Limited T/A. British United C.I. Airways
 Alia-The Royal Jordanian Airlines Corporation
 Alitalia-Linee Aeree Italiane—S.p.A.
 All Nippon Airways Company, Ltd.
 ALM Dutch Antillean Airlines
 Ansett—ANA (A division of Ansette Transport Industries
 (Operations) Pty. Ltd.)
 Argo, S.A.
 Ariana Afghan Airlines Co., Ltd.
 Australian National Airlines Commission, Trading as Trans-
 Australia Airlines
 Austrian Airlines, Österreichische Luftverkehrs—
 Aktiengesellschaft
 Aviacion y Comercio, S.A.
 B.K.S. Air Transport Limited
 Bahamas Airways Limited
 Balair AG
 Belairco Aviation Inc. (Doing business as Bellingham-Seattle
 Airways)
 Britannia Airways Limited
 British Caledonian Airways, Limited
 British European Airways Corporation
 British Midland Airways Limited
 British Overseas Airways Corporation
 British United Airways Limited
 British West Indian Airways Limited

BEA Airtours Limited
 Cambrian Airways Limited
 Canadian Pacific Airlines, Limited
 Canadian Voyageur Airlines Limited
 Caraibische Lucht Transport Maatschappij, N.V. (Caribbean
 Air Transport Company, Inc.)
 Caribwest Airways Limited
 Cathay Pacific Airways, Limited
 Cayman Airways Limited
 Central African Airways Corporation
 Central African Airways Limited
 Ceskoslovenske Aerolinie
 Channel Airways Limited
 China Airlines, Ltd.
 Civil Air Transport Company Limited
 Collingwood Air Services Limited
 Compagnie Nationale Air France
 Compagnie Nationale de Transports Aeriens (Royal Air Maroc)
 Commuter Air Services Ltd.
 Compania de Aviacion Faucett, S.A.
 Compania de Dominicana de Aviacion, C. por A.
 Compania Ecuatoriana de Aviacion, S.A.
 Compania Internacional Aerea S.A. (CIASA)
 Compania Mexicana de Aviacion, S.A.
 Compania Panamena de Aviacion, S.A.
 Compania Peruana Internacional de Aviacion S.A.
 Conair Ltd.
 Condor Flugdienst G.m.b.H.
 Cross Canada Flights Ltd.
 Cyprus Airways Limited
 Deutsche Lufthansa Aktiengesellschaft (also operating as Luf-
 thansa German Airlines)
 D.T.A.—Linhas Aereas de Angola
 Donaldson Line (Air Services) Limited, d/b/a Donaldson Inter-
 national Airways
 East African Airways Corporation

Eastern Provincial Airways, (1963) Limited
 Egypt Air
 El Al Israel Airlines Limited
 Emerald Airways Ltd.
 Ethiopian Air Lines, Inc.
 Fiji Airways Limited
 Finnair Oy
 Flugfelag Islands, H.F. (Icelandic Airways Ltd.)
 General Department of International Air Services (Aeroflot,
 "Soviet Airlines")
 Germanair Bedarfsluftfahrt Gesellschaft m.b.H. & Co. KG
 Ghana Airways Corporation
 Gibraltar Airways Limited
 Gravenhurst Aviation Limited
 Great Lakes Airlines Limited
 Gulf Aviation Company
 Guyana Airways Corporation
 P. N. Garuda Indonesian Airways
 Flightexec Limited
 Empresa Guatemalteca de Aviacion
 Harrison Airways Limited
 Holland-America Lijn, n.v. (Netherlands) (Holland America
 Line)
 Iberia, Lineas Aereas de Espana, S.A.
 Indian Airlines Corporation
 Inex Adria Airways
 Internacional de Aviacion, S.A. (INAIR)
 International Jet Air Ltd.
 Iran National Airlines Corporation
 Iraqi Airways
 Japan Air Lines Company, Ltd.
 Jugoslovenski Aerotransport (JAT)
 Kar-Air OY
 K.L.M. Royal Dutch Airlines
 Korean Air Lines Co., Ltd.
 Korea Air Terminal Service Co., Ltd. (Republic of Korea)

Kuoni Travel, Inc. (Kuoni Travel Limited (Switzerland) d/b/a)
 Laker Airways Limited
 Lansa, S. de R.L.
 Lebanese International Airways
 Leeward Air Transport Services Limited
 Leeward Islands Air Transport Services Limited
 Linea Aerea Nazionale—Chile (LAN)
 Linea Aeropostal Venezolana
 Linea Aereas Costarricenses, S.A.
 Lineas Aereas de Nicaragua, S.A.
 Lloyd Aereo Boliviano, S.A.
 Loftleidir H.F. Icelandic Airlines Ltd.
 Luftverkehrsunternehmen Atlantis A.G.
 LUXAIR—Societe Anonyme Luxembourgeoise de Navigation
 Aerienne
 Malayan Airways Limited
 Malaysia-Singapore Airlines Limited
 MALEV—Hungarian Airlines
 Martin's Luchtvervoer Maatschappij N.V. (Martin's Air Char-
 ter Company)
 Mackenzie Air Ltd.
 Middle East Airlines Airliban S.A.L.
 Middle East Airlines Company, S.A.
 New Zealand National Airways Corporation
 Nigeria Airways, Ltd.
 Nordair Ltee—Nordair Ltd.
 North Canada Air Limited c.o.b. NORCANAIR
 Olympic Airways S.A.
 Out Island Airways Limited
 Pacific Western Airlines, Ltd.
 Pakistan International Airlines Corporation
 Philippine Air Lines, Inc.
 PLUNA, Primeras Lineas Uruguayas de Navegacion Aerea
 Polskie Linie Lotnicze "LOT"
 Ontario Central Airlines Limited
 Orillia Air Services Limited

Polynesian Airlines Limited
 Pomair N.V.
 Qantas Airways Limited
 Quebecair
 Reseau Aerien Interinsulaire
 Royal Air Cambodge
 Royal Air Lao
 Saudi Arabian Airlines
 Scandinavian Airlines System
 Seagreen Air Transport Limited
 Servicio Aereo de Honduras, S.A.
 Servicio Aereo de Transportes Comerciales (SATCO)
 Servicios Aereos Cruzeiro Do Sul S.A.
 Sociedad Aeronautica De Medellin Consolidada S.A. SAM
 Societe Anonyme Belge d'Exploitation de la Navigation Aerienne
 (SABENA) (also operating as "SABENA" Belgian World
 Airlines)
 South African Airways
 Spantax, S.A.
 Sudan Airways
 Superior Airways Limited
 Surinaamse Luchtvracht Onderneming N.V. (Surinam Air
 Cargo Corporation)
 SWISSAIR, Swiss Air Transport Company Limited
 TACA International Airlines, S.A.
 Tarom-Transporturile Aeriene Romine
 Thai Airways International Ltd.
 Thos. Cook & Son Inc. (U.S.) (Thos. Cook & Son (Continental
 and Overseas), Ltd. (Great Britain) d/b/a)
 Trans-Australia Airlines
 Trans Caribbean Airways
 Trans-Mediterranean Airways S.A.L.
 Transair Limited
 Transavia, N.V.
 Transmeridian Air Cargo Limited
 Transportation Corporation of America

Transporte Aereo Rioplatense, S.A.C.E.I.
Transportes Aereos Benianos, S.A.
Transportes Aereos De Cargo, S.A. (Transcarga)
Transportes Aereos Nacionales S.A.
Transportes Aereos Portugueses, S.A.R.L.
Turk Hava Yollari Anonim Sirketi
Turks and Caicos Air Services, Ltd.
Union de Transports Aeriens (U.T.A.)
Union of Burma Airways Board
"VARIG", S.A. (Viacao Aerea Rio-Grandense)
Venezolana Internacional de Aviacion, S.A. (VIASA)
Viacao Aerea Sao Paulo, S/A "VASP"
Wagner Aviation Limited
Wardair Canada Ltd.
Windward Islands Airways International N.V.

Superior Court of California
CITY AND COUNTY OF SAN FRANCISCO

Department Law and Motion

August 25, 1982

No. 784512

ELECTRONIC MEMORIES AND MAGNETICS CORP.,

Plaintiff,

v.

THE FLYING TIGER LINE, INC., *et al.*

Defendant.

The cross-motions of plaintiff and defendant for partial summary judgment were heard and submitted for decision on August 10, 1982.

The motion of plaintiff is denied.

The motion of defendant for partial summary judgment is granted.

The Court determines that the last official U. S. price of gold at \$42.22 per ounce shall be used in calculating the limit of liability under the Warsaw Convention.

.....
Judge of the Superior Court

JOHN B. HOOK, ESQUIRE

Long & Levit

Four Embarcadero Center, Suite 1800

San Francisco, CA 94111

JESS B. MILLIKAN, ESQUIRE

Derby, Cook, Quinby & Tweedt

333 Market Street, Suite 2800

San Francisco, CA 94105

IN THE
United States District Court
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

NO. 81 C 4726

DEERE & COMPANY,

Plaintiff,

v.

DEUTSCHE LUFTHANSA AKTIENGESELLSCHAFT,

Defendant.

MEMORANDUM OPINION

This is an action in which plaintiff Deere & Company ("Deere") seeks recovery against defendant Deutsche Lufthansa Aktiengesellschaft ("Lufthansa") for damage to its IBM model 3032 computer that occurred during Lufthansa's transport of the computer from Chicago, Illinois, to Frankfurt, Germany. The computer was shipped in 14 packages. The package containing the director frame was damaged. Lufthansa has moved for summary judgment regarding the applicable standard governing limitation of its liability. Deere has filed a cross-motion for partial summary judgment. We grant Lufthansa's motion and deny Deere's motion.

In this memorandum opinion, we shall address one question: whether Lufthansa's liability for the damaged computer as set out in Article 22(2) of the Warsaw Convention—250 French gold francs per kilogram—is to be converted to United States dollars with reference to the exchange value of the current French franc, the former "official" price of gold, the free market price of gold, or the Special Drawing Right ("SDR") used by the International Monetary Fund.

In its motion for summary judgment, Lufthansa seeks to limit its liability under Article 22 of the Warsaw Convention, Convention for the Unification of Certain Rules Relating to International Transportation by Air, opened for signature October 12, 1929, 49 Stat. 3000, T.S. No. 876,137 L.N.T.S. 11 (adherence of the United States proclaimed October 29, 1934).¹ Article 22 of the Warsaw Convention provides that, unless a special declaration of value is made at the time of a delivery, a carrier's liability for baggage or goods is limited to the equivalent of 250 francs per kilogram. Article 22 states, moreover, that this limitation of 250 francs

shall be deemed to refer to the French franc consisting of 65½ milligrams of gold at the standard of fineness of nine hundred thousandths. These sums may be converted into any national currency in round figures.

At the time when Article 22 was drafted, gold served official monetary functions and its price was set by law. Since that time, in the United States¹ and the world, gold is no longer used as a standard of value; it no longer has an official price. Despite this change in the nature of the value of gold, Article 22, at least at the time of damage to the director frame, had not been amended to substitute a new standard of value for gold. Although the parties to the Warsaw Convention recognized the need for some amendment to Article 22, they could not agree upon one. The Civil Aeronautics Board, however, has continued to allow airlines to calculate their limitation of liability under the Warsaw Convention based upon the last official price of gold. The Board views this as a legal fiction which preserves the intention of the Warsaw Convention to limit the liability of air carriers. *Boehringer Mannheim Diagnostics v. Pan Am*, 531 F. Supp. 344, 351-52 (S.D. Tex. 1981). Nevertheless, some courts have rejected calculating the limitation on liability based upon the last official

1. The official United States price of gold was abolished in 1978. Par Modification Act, Pub.L. No. 94-564, 90 Stat. 2660 (1976).

United States price of gold. See, e.g., *id.*; *Franklin Mint Corp. v. Trans World Airlines*, 525 F. Supp. 1288, 1289 (S.D.N.Y. 1981), *reversed*, No. 82-7012 (2d Cir. September 26, 1982).

We recognize that each of the solutions offered by the parties here and elsewhere² is easy to criticize. What is needed is a treaty amendment, but we do not have that. Therefore, we have to choose one of the other alternatives. The one which seems most nearly to effectuate the intention of the treaty to *limit* the liability of air carriers is to employ the last official United States price of gold. We agree with the court in *In re Air Crash Disaster at Warsaw, Poland*, 535 F. Supp. 833, 843 (S.D.N.Y. 1982), which, in holding as we do, stated:

The clear merit of using this price as the unit for conversion is that the price constitutes a conversion factor established by precisely the kind of mechanism that the Convention's drafters contemplated when the applicable clauses were drafted. The use of the last official United States price for gold means the use of a conversion factor chosen by the United States at the time the price was set to determine the relationship of this country's currency and those of other nations using a similar standard for conversion. Such a conversion factor, grounded in the policy of this country with respect to the value of its currency *vis-à-vis* all other currencies based upon the gold standard has a

2. The Second Circuit in its opinion in *Franklin Mint v. Trans World Airlines*, No. 82-7012 (2d Cir. September 26, 1982), concisely pointed out the problems with each of the solutions raised by the parties:

The last official price of gold is a price which has been explicitly repealed by the Congress . . . It thus lacks any status in law or relationship to contemporary currency values. The free market price of gold is the highly volatile price of a commodity determined in part by forces of supply and demand unrelated to currency values. SDRs are a creature of the IMF [International Monetary Fund], modified at will by that body and having no basis in the [Warsaw] Convention. The French franc is simply one domestic currency, subject to change by the unilateral act of a single government.

Id. at 4 (citation omitted). The opinions in *Franklin Mint* and *In re Air Crash Disaster at Warsaw, Poland*, 535 F. Supp. 833, 839-42 (S.D.N.Y. 1982), discuss at length the arguments made for each of these theories.

stability which would be entirely lost if the unit of conversion were subject to the fluctuations of a private commodities market relatively untouched by the regulating influence of any public policy.

We hold that the last official United States price of gold - \$42.22 per ounce - governs the limitation on liability in this case.

For the above reasons, we grant Lufthansa's motion for summary judgment as to the use of the last official United States price of gold in calculating the limitation of liability in Article 22 of the Warsaw Convention. We deny Deere's cross-motion for summary judgment on this issue.

DATED: Dec. 30, 1982

ENTER..... JOHN R. GRODY
United States District Judge

[*The Netherlands v. Giants Shipping Corp.*,
Rechtspraak van de Week 321 (May 30, 1981)
(Sup. Ct. of The Netherlands May 1, 1981)]

TRANSLATION FROM DUTCH

The Supreme Court of the Netherlands

Having considered the petition of the State of the Netherlands, having its seat in The Hague (hereinafter "the State"), represented by Mr. E. Korthals Altes, Attorney, Barrister at the Supreme Court, said petition purporting to annul a decision of June 13, 1980 of the Court of Appeal of The Hague;

Having considered the written defense lodged by Giants Shipping Corporation, a corporation under Liberian Law, having its seat in Monrovia, Liberia (hereinafter "Giants"), represented by Mr. C. D. van Boeschoten, Attorney, likewise Barrister at the Supreme Court, said defense purporting, primarily, to declare inadmissible the appeal of the State, and, alternatively, to dismiss that appeal;

Having taken into account the pleadings of Attorney-General Haak—delivered also in the matter No. 11.705—purporting, in the matter under reference, to annul the Court's contested decision, but only insofar as it fixes the amount to which Giants' liability is limited at the equivalent in Netherlands currency of an amount of 12,764,810 gold francs, fixed at 65.5 milligrams gold of 900/1000 fineness, converted at the rate of exchange of the day on which it [Giants] complies with the order of the Court of Rotterdam, given in its decision of November 23, 1979, to furnish security for this amount, and, insofar as, subject to decision by the Supreme Court, it fixes the amount to which, for the moment, Giants' liability is limited, at 12,764,810 [units of] 1/15 Special Drawing Rights considered equivalent to the franc referred to in Article 740d, paragraph 4 of the Commercial Code, as these [Special Drawing Rights] are defined by the International Monetary Fund, converted into Netherlands money according to the valuation method applied by the Fund for its own operations and

transactions, at the rate of exchange of the day on which Giants complies with the order of the Court of Rotterdam, given in its decision of November 23, 1979, to furnish security;

Having considered the contested decision and the other documents, from which it appears as follows:

By petition received on June 29, 1979, by the Clerk of the Court, Giants applied to the District Court at Rotterdam with the following requests:

"a. to fix the amount to which Giants' liability, as mentioned in the petition, is limited for the moment at 12,764,810 gold francs, fixed at 65.5 milligrams of 900/1000 fineness;

b. to order that a procedure be instituted for the distribution of this amount;

c. to direct that Giants furnish security by means of a guaranty of the United Kingdom Mutual Steam Ship Assurance Association (Bermuda) Limited, having its seat in Hamilton, Bermuda, for a maximum amount of Fl. 2,210,000.00, increased by legal interest thereon from the day of the decision in this matter, and increased by an amount to cover the costs of the proceedings, to be fixed at Fl. 10,000.00.

d. to order that, when Giants has satisfied the Court that it has complied with the order referred to under c., a magistrate be appointed to determine the statement of dividends of the aforementioned amount and also an administrator thereof;

e. to order that the security bond referred to in this petition be returned when Giants has satisfied the Court that it has complied with the order referred to under c. and when Giants' petition is granted uncontested, or after any written defense has been conclusively rejected;"

Against this, the State lodged a written defense with the aforementioned Court, which contained the following requests:

"a. to fix, for the moment, the amount to which Giants' liability is limited at the market price of the quantity of gold corresponding to 12,764,810 gold francs, fixed at 65.5 milligrams gold of 900/1000 fineness, to be calculated at the price on the conversion date as referred to in Article 740d, paragraph 4 of the Commercial Code;

b. to direct Giants to furnish good and valid security by means of a bank guaranty;"

The Court, having heard counsel for Giants and the State, among others, in chambers, decided on November 23, 1979, as follows:

"Fixes the amount to which Giants' liability is limited for the moment, at the countervalue in Netherlands currency of 12,764,810 gold francs, fixed at 65.5 milligrams gold of 900/1000 fineness, calculated according to the rate of the free market value of that quantity of gold on the day security is furnished.

Directs Giants to furnish security for this amount by means of a guaranty of The United Kingdom Mutual Steam Ship Assurance Association Limited, having its seat and office in Hamilton, Bermuda, increased by legal interest from the date of this decision and also by an amount of Fl. 10,000.00 to cover the costs of these proceedings.

Rejects any other or additional claims."

This decision is based on the following considerations:

"1. that Giants is owner and operator of the Liberian seagoing vessel "Blue Hawk," which collided on December 29, 1978, in Terneuzen with the northern bridge over the outer mole of the western lock and the brake mechanism at the east side of the outer mole of the western lock; that, with respect to that collision, claims for damage to property were lodged against Giants by the State, the Terneuzen municipality and the Taxicentrale [Cab Service] Terneuzen B.V.; that Giants wishes to avail itself of

the right to limitation of its liability with respect to said collision, granted it by virtue of Articles 740a through 740d of the Commercial Code;

2. that the Court fixes the net tonnage of the "Blue Hawk" as referred to in Article 740d, first paragraph, of the Commercial Code, and observing the stipulations in the third paragraph of said article, at 12,764.81 tons; that furthermore, the Court, pursuant, to the aforesaid article, limits, for the moment, Giants' aforementioned liability to, and fixes it at, 12,764,810 gold francs, fixed at 65.5 milligrams gold of 900/1000 fineness;

3. that Giants and the State, the latter being joined by the Terneuzen municipality and the Taxicentrale Terneuzen B.V., differ in opinion on the applicable conversion rate of those gold francs, as mentioned in the documents;

4. that, for lack of a valid contractual and/or statutory stipulation on a definite conversion rate to be applied, and also because no introduction of such stipulation can be expected, within a period that would be reasonable for the matter now before us, that might have allowed anticipation thereon, the Court can hardly determine anything other than that the free market value of the aforementioned legally defined quantity of gold determines at present the conversion rate, even if this implies a greater liability than that according to the arrangements applying until August 1, 1978;

5. that, since this is a case of limitation of liability deviating from that under Common Law, this exception should indeed not be interpreted more broadly to the disadvantage of the injured party, than ensues mandatorily from contract or law;

6. that in its petition Giants has offered to furnish security for the amount of liability to be fixed, increased

by interest and costs, by means of a guaranty of The United Kingdom Mutual Steam Ship Assurance Association Limited, having its seat and office in Hamilton, Bermuda, and the Court considers, under the circumstances of the case, such guaranty sufficiently good and valid security, now that the State has not further supported its opposition thereto;

7. that, insofar as Giants' requests as mentioned hereinabove under b. and d. are concerned, the Court shall not consider these matters before Giants has satisfied the Court that the directive stipulated below has been complied with, as these matters are considered premature at this stage of the request;

8. that, insofar as Giants' request as mentioned hereinabove under e. is concerned, it is not possible to entertain same, as such request cannot now be brought up;"

Giants appealed against this decision with the aforementioned Court of Appeal, which after hearing at its session of April 18, 1980, counsel for Giants and for the State, gave on June 13, 1980, the following decision, which is now contested in the present appeal:

"Annuls, upon appeal, the decision of November 23, 1979, of the Court in Rotterdam, insofar as it:

(1) fixes the amount to which Giants' liability is for the moment limited, at the countervalue in Netherlands currency of an amount of 12,764,810 gold francs, fixed at 65.5 milligrams gold of 900/1000 fineness, calculated at the rate of the free market value of that quantity of gold on the day security is furnished;

(2) rejects the request that the Court issue an order that a procedure be instituted for the distribution of the amount to which liability is limited;

and, deciding anew in these respects:

(1) fixes the amount to which liability is for the moment limited, at the countervalue in Netherlands currency of an amount of 12,764,810 gold francs, fixes at 65.5 milligrams gold of 900/1000 fineness, converted at the rate of the day on which Giants complies with the order, given in the aforementioned decision, to furnish security for this amount;

(2) orders that a procedure shall be instituted for the distribution of the amount to which the liability is limited;

Upholds the aforementioned decision for the rest;

Returns the case to the Court in Rotterdam for further dealing with Giants' request;"

The considerations of the Court of Appeal in the case were:

"1. The present appeal is lodged against a decision given by the Court pursuant to Article 320c of the Code of Civil Procedure, on a request submitted by Giants to the Court pursuant to Article 320a of said Code.

2. The aforementioned request was to the effect, materially and insofar as is relevant at present, that Giants—submitting to avail itself of the right, granted it by virtue of Article 740a of the Commercial Code, to limitation of its liability for claims connected with the collision on December 29, 1978, of the seagoing vessel "Blue Hawk" with the northern bridge over the outer mole of the western lock in Terneuzen—requested to fix (provisionally) the amount of said limited liability, in accordance with the stipulations of Article 740d of said Code, at 12,764,810 gold francs, fixed at 65.5 milligrams gold of 900/1000 fineness and to order that Giants furnish security for same. The request was also to the effect that the Court give order that a procedure shall be instituted for the distribution of the aforementioned amount.

3. In its aforementioned decision, the Court granted the first request, in such a manner that the amount to which Giants' liability is limited for the moment, was fixed at "the countervalue in Netherlands currency of an amount of 12,764,810 gold francs, fixed at 65.5 milligrams gold of 900/1000 fineness, calculated at the rate of the free market value of that quantity of gold on the day the security is furnished," said security being ordered, at the same time, for said amount, increased by legal interest from the day of the decision and by an amount of Fl. 10,000.00 for the costs of the proceedings. The second request was rejected.

4. The appeal claims, firstly, that the Court wrongfully determined that the amount of the limited liability and the security to be furnished for same be calculated at the rate of the free market value of the mentioned gold francs, and it claims, secondly, that the Court wrongfully rejected the second request mentioned hereinabove.

5. First of all, the question arises whether the present decision is open to appeal, and the Court of Appeal must examine this question officially.

Relative to this question, it must be held that, by virtue of Article 345 of the Code on Civil Procedure, appeal is possible, because according to the law, and in particular also in Articles 320a through 320z and especially in Article 320x of said Code, appeal against a decision such as the present one is not explicitly excluded, and also because neither the effect of the present course of proceedings nor the decision under discussion imply that appeal against it is not permissible.

As also the term [for appeal] mentioned in said article was observed, Giants' appeal is, therefore, admissible.

6. With respect to the first claim put forward by Giants, as stated hereinabove, it must be held that the

system of the procedure for the limitation of the liability mentioned in this case implies—as explicitly expressed in Article 740*d* of the Commercial Code—that in the present case, in which the furnishing of security is ordered, the conversion of the amount in gold francs into Netherlands currency must be made at the rate of the day on which the order to furnish security is complied with. Because at the time of the Court's decision and now, it is not certain at what time Giants shall furnish security, and it is, therefore, not possible to determine, at this time, which rate must be applied, the Court wrongfully determined in the contested decision that the conversion in Netherlands currency of the gold francs must be made at the rate of the free market value thereof, so that this decision must be annulled in that respect. Therefore, all the observations concerning the rate to be taken into account for the conversion, put forward on behalf of Giants and on behalf of the State of the Netherlands, must now be set aside.

7. With respect to the second claim put forward by Giants, as stated hereinabove, it must be held that by virtue of the stipulations at the end of the first paragraph of Article 320*a* of the Code of Civil Procedure, and the further course of proceedings provided for in the subsequent articles of said Code, the decision granting the request as referred to in Article 320*a* must also order that a procedure be instituted for the distribution of the amount to which the liability is limited.

Therefore, the Court wrongfully rejected this request, so that the decision must be annulled in this respect and said order must yet be given.”;

Considering that the State contests this decision, basing its appeal on the following grievances:

“Breach of justice and neglect of forms, non-observance of which brings about nullity, as the Court of Justice

considered Giants' appeal admissible for reasons mentioned in the aforementioned decision and which are considered repeated and included herein, and subsequently decided in the verdict of the contested decision, thereby partly annulling the decision of the Court in Rotterdam, as mentioned in the verdict of the contested decision, all this wrongfully for the following reasons:

a) The Court of Appeal wrongfully admitted Giants' appeal, reasoning that, by virtue of Article 345 of the Code of Civil Procedure, appeal is possible, because according to the law, and in particular also in Article 320a through 320z and especially in Article 320x of said Code, appeal against a decision such as the present one is not explicitly excluded, and also because neither the effect of the present course of proceedings nor the decision under discussion imply that appeal against it is not permissible.

The legal system, as embodied in the Articles 320a through 320z of the Code of Civil Procedure, the nature of the present decision as well as, in particular, Article 320x of the Code of Civil Procedure, really does oppose the possibility of appeal against a decision such as the one under discussion, given by the Court by virtue of Article 320c of the Code of Civil Procedure.

b) The Court of Appeal held wrongfully that the system of the procedure for the limitation of the liability implies—as also explicitly expressed, according to the Court of Appeal, in Article 740d of the Commercial Code—that in the present case, in which the furnishing of security is ordered, the conversion of the amount in gold francs into Netherlands currency must be made at the rate of the day on which the order to furnish security is complied with, and that, as at the time of the Court's decision, like now, it is not certain at what time Giants shall furnish security and it is, therefore, not possible to determine, at

this time, which rate must be applied, the Court wrongfully determined in the contested decision that the conversion into Netherlands currency of the gold francs must be made at the rate of the free market value thereof. The Court of Appeal also decided wrongfully that all the observations concerning the rate to be taken into account for the conversion, put forward on behalf of Giants and on behalf of the State of the Netherlands, must now be set aside.

Judging thus, the Court of Appeal omitted, wrongfully, to determine at which rate—of the day on which Giants complies with the order to furnish security—the amount of 12,764,810 gold francs fixed at 65.5 milligrams gold of 900/1000 fineness is to be computed.

In this respect, the Court of Appeal ought to have confirmed the contested decision of the Court in Rotterdam and fixed the amount to which Giants' liability is for the moment limited, at the countervalue in Netherlands currency of an amount of 12,764,810 gold francs fixed at 65.5 milligrams gold of 900/1000 fineness, calculated according to the rate of the free market value of that quantity of gold on the day security is furnished.”;

Considering that Giants, in its statement of defense lodged with the Supreme Court, supported its appeal against the admissibility of the appeal to the Supreme Court by the State with the following arguments:

“The State apparently takes the position that it is one of the parties that appeared in one of the previous instances and that it can, therefore, appeal to the Supreme Court by virtue of Article 426, paragraph 1 of the Code of Civil Procedure. Giants is of the opinion that the State cannot be regarded as a party that appeared in the previous instances and was also not regarded as such by the Court of Appeal. In the appeal proceedings at the Court of Appeal the State has not submitted a statement of defense

and the Court of Appeal mentioned the State in its contested decision only as "... one of the parties mentioned by Giants toward whom it is of the opinion it can invoke the right to limitation of its liability." The nature of the proceedings under reference implies, furthermore, that those toward whom the limitation of liability can be invoked cannot oppose in a suit such as the one under reference the (provisional) limitation of the shipowner's liability, but must follow to that end the judicial proceedings initiated with the statement of defense by virtue of Article 320g. paragraph 1 of the Code of Civil Procedure. It results from the above that the State is not permitted to appeal to the Supreme court.

Whereas:

1. Giants argued that the State's appeal to the Supreme Court is not admissible, submitting that the State cannot be regarded as having appeared "in one of the previous instances" in the sense of Article 426, paragraph 1 of the Code of Civil Procedure. This argument must be rejected.

2. The Court mentions in its decision of November 23, 1979, that it has "seen" the State's statement of defense received on July 6, 1979, lodged by the State's solicitor E.C.G. Klinkhamer, Attorney. From this, it must be concluded that the Court permitted the State to submit a statement of defense. The decision also states that the Court, by virtue of its decision of July 6, 1979, which ordered, among other things, that the State be summoned, had heard B.D. Wubs, Attorney in The Hague, counsel for the State. All this means that the State did appear in the first instance in the sense of Article 426, paragraph 1. Though the creditors do not have the right to submit a statement of defense against a request as referred to by

Article 320a and though the judge is not obliged to summon the creditors mentioned by the petitioner, no stipulation in the law prevents the judge from permitting the submission of a statement of defense and from ordering the creditors to be summoned¹. In particular, the possibility provided for by Article 320g, paragraph 1, second sentence, to submit, when the distribution procedure proper has been started, a statement of defense relating to the points mentioned therein, does not prevent the judge from offering the opportunity for defense already in an earlier stage, i.e., that of dealing with the request as referred to in Article 320a. If a creditor availed himself of this opportunity, he did appear in the sense of Article 426, of paragraph 1.

Furthermore, as appears from the decision of the Court of Appeal on the written appeal lodged by Giants, B.D. Wubs, Attorney in The Hague, counsel for the State, was "heard at the session of April 18, 1980." This means that the State also did appear in the appeal before the Court of Appeal in the sense of Article 426, paragraph 1, even though the State—as Giants argued—did not lodge a statement of defense in the appeal proceedings.

The State's grievances as to the nonadmissibility of the appeal to the Supreme Court must therefore be rejected.

3. Part a. of the grievance refers to the question of whether the possibility of appeal by the petitioner—the debtor—is open on a decision on a request as referred to in Article 320a.

Firstly, the question arises if such a decision can be regarded as "a judgment of the Court" in the sense of Article 320x, paragraph 2. A combination of arguments leads to a negative reply.

The latter stipulation speaks of a "judgment," whereas in Article 320i the determination mentioned in Article 320c is called a "decision." Article 320x, paragraph 2, speaks of the "day of pronouncement"; it is not plausible

that in the system that was in the mind of the legislator, there was room for a pronouncement of a decision on a request as referred to in Article 320a. The short term for appeal—four weeks—is evidently connected with the legislator's desire to accelerate the distribution procedure; same can be started only after the debtor has complied with the order given him by the Court, as referred to in Article 320c, paragraph 1. The decision on the request referred to in Article 320a, however, precedes the distribution procedure proper, so that the reason to determine a short term for appeal does not apply here. Finally, the mandatory notification to the Clerk of the Court, stipulated in paragraphs 3 and 4 of Article 320x, is evidently connected with the tasks with which the Clerk of the Court is charged by various articles—such as Article 320l and Article 320t, paragraph 1—within the framework of the distribution procedure. The decision on a request as referred to in Article 320a is given, however, in an earlier stage and one cannot see what sense a notification to the Clerk of the Court would have at that stage.

All this leads to the conclusion that Article 320x, paragraph 2, does not refer to a decision on a request as referred to in Article 320a.

4. It should, therefore, now be examined if Article 345 implies that appeal on such a decision is open to the petitioner.

If the request is rejected, or is granted in such a manner that the petitioner—i.e., the debtor—is aggrieved by it, he may appeal against the decision by virtue of Article 345. Neither the law nor the nature of the decision are opposed to it. At this stage, the only question that is relevant is whether, and if so under which conditions, the debtor will be able to have the distribution procedure started. In these cases, the debtor has an interest to submit these questions to the judge in appeal. Article 320g, paragraph

1, last sentence—which the State invoked in particular—plays a role only in the next stage, i.e., in that of the distribution procedure proper. For this reason already, that article does not stand in the way of allowing the petitioner the right of appeal with respect to the decision on a request as referred to in Article 320a.

5. The above implies that the Court of Appeal was right in admitting Giants' appeal. Therefore, Part a. of the grievance must be rejected.

6. The grievance under b. has a twofold bearing. In the first place, it purports to argue that the Court should not have abstained from answering the question according to which criterion the amount of 12,764,810 gold francs, mentioned in the decision of the Court of Justice, should be converted into Netherlands currency. Furthermore, it purports to argue that that criterion should serve the free market value of the quantity of gold involved, on the day security is furnished.

The Supreme Court will address itself first to the question of whether the Court of Appeal should have expressed its opinion on the question of the criterion.

7. The arrangement contained in Articles 320a-320z, as determined by the Law of June 3, 1965, Official Gazette No. 239, differs, insofar as is relevant to this case, from the earlier arrangement, in the sense that under the present arrangement the court fixes the amount to which the liability of the debtor is limited for the moment (Article 320c, first paragraph), whereas, previously, the law (in the old Article 320a) referred, for the magnitude of the amount to be paid by the debtor, to the relevant articles of the Commercial Code. This means that under the old arrangement, it was initially left to the debtor to determine that amount—with the understanding that during the distribution procedure each creditor could contest the "sufficiency" thereof (old Article 320f)—whereas at present, the magnitude of the amount the debtor must pay, or

for which he must furnish security, is immediately put under the supervision of the court. The legislator, in so determining, will have intended that the calculation of the amount in accordance with the criteria mentioned in Article 740*d*, paragraphs 1, 2 and 3 of the Commercial Code shall be supervised. The question of what, for the conversion referred to in Article 740*d*, paragraph 4, should be considered as "the rate of the day" of payment, or of furnishing security, was not a problem in the opinion of the legislator; however, in the case before us, it does present a problem, since, as will be discussed in point 10 hereunder, at the time the Court of Appeal pronounced its decision—and also at the time of the decision of the lower court—the official parity of the guilder expressed in gold no longer existed. According to the documents of the case, this problem was the subject of a debate in the first instance and in the appeal; it was, in fact, the issue of the dispute. Under these circumstances, the Court of Appeal should not have abstained from answering this question.

As it is, the intent of the arrangement—that not the debtor but the judge fixes the amount to which the liability is limited for the moment—implies that the judge must express himself in the order to be given by virtue of Article 320*c*, paragraph 1, on the debated point of the criterion for conversion, to avoid that the debtor himself, when making payment or furnishing security, initially establishes the criterion for the conversion, and, therewith, the magnitude of the relevant amount. In this connection, it must also be noted that Articles 320*d*, 320*e* and 320*f*, paragraph 1 assume that by means of the order given by virtue of Article 320*c*, paragraph 1, it can be shown that the debtor complied with that order: and this also involves that the order should not leave any uncertainty—in cases such as the one before us—on the crucially important point of the criterion for conversion.

Therefore, Part b., insofar as it submits the grievance that the Court of Appeal wrongfully abstained from determining that criterion, is well-founded.

8. Insofar as Part b. purports to argue that the conversion referred to in Article 740*d*, paragraph 4 of the Commercial Code must be made with due regard to the free market value of gold, it must be rejected on the grounds following hereafter.

9. In its judgment of April 14, 1972, Netherlands Case Law 1972, 269, the Supreme Court gave a decision on the manner in which that conversion must be made, which was based, among other things, on considerations drawn from the wording, the history of the origin and the intent of the Treaty, concluded in Brussels on October 10, 1957, on the limitation of liability of owners of seagoing vessels, for the implementation of which Treaty Articles 740*a* through 740*d* were incorporated in the aforementioned Code. That decision held that, as long as there are international agreements among a large majority of countries that are a party to said Treaty, on the mutual currency relations that are based on a common valuation of gold, the conversion into Netherlands currency of the franc referred to in said article—hereinafter referred to, for the sake of shortness, as the franc—must be made on the basis of the official, i.e., the legally fixed, parity of the guilder expressed in gold at the time of said conversion, and not on the basis of the rate of gold quoted at that moment on the free market.

10. Since that time, far-reaching developments have occurred in the international monetary field, which led to the Second Amendment to the Articles of the Agreement of the International Monetary Fund (Journal of Treaties 1977, 40), approved for the Kingdom by the Law of March 23, 1978, Official Gazette 173, and, in connection therewith, to the introduction, effective as of August 1, 1978, of the Law concerning the rate of exchange of the

guilder, and the repeal, connected therewith and effective as of the same date, of the Law on the par value of the guilder.

These developments indicate, insofar as is relevant here, and as far as the Netherlands are concerned at least since the aforementioned date, that gold has lost all monetary significance. One cannot speak any more, at present, of an official parity of the guilder expressed in gold. This means that in the light of the objectives of the Treaty of 1957—as expressed by the Supreme Court in its aforementioned judgment—the appropriateness of the franc, expressed in gold, to serve as a generally accepted unit of account for determining internationally uniform limits of liability was lost.

11. Consequently, a lacuna occurred in Article 740*d* and in the stipulation of the treaty on which it was based. To fill same, steps were taken meanwhile, both on the international level and by national legislators, which led to the adjustment of the Treaty of 1957 to the new monetary situation by means of a Protocol established in Brussels on December 21, 1979, amending said treaty, and to similar adjustments of the national legal arrangements in various countries by means of legislative measures; in this country, a draft bill (No. 15.459) for such a law was passed by the Second Chamber of Parliament on February 17, 1981.

However, as long as the adjustment arrangement as referred to hereinabove has not yet force of law in the Netherlands, the judge cannot—also because of the considerations under point 7 hereinabove—abstain from giving a conversion standard.

12. The point of departure should be the preference—underlying the Treaty and, therefore, Article 740*d* as well—for a standard which is current in the international monetary field for determining the internationally uniform limits of liability intended by the Treaty.

To convert the franc in the manner the State pleads in these proceedings, according to the price of gold on the free market, would be contrary to this point of departure. The aforementioned point of departure will rather lead to joining the choice made by the Member States of the International Monetary Fund for a unit of account which is suited to be used as such in international payments, since gold has ceased to be a monetary standard. The choice fell on the Special Drawing Right (SDR) of the aforementioned Fund, the value of this unit being initially expressed in gold, i.e., a weight amounting to approximately 15 times the gold weight of the aforesaid franc.

This ratio, and the circumstance that, when gold as a value standard of the SDR was replaced by a collection of national currencies (the so-called standard basket), and the new criterion was chosen in such a manner that at the moment of change, the value of the SDR was the same according to both criteria, make it possible to join this choice by considering the franc equal to 1/15 SDR for its conversion into Netherlands currency and to effect the conversion according to the valuation method applied by the Fund for its own operations and transactions.

13. To fill the lacuna in this manner is in harmony with the legal conceptions adopted since, as these find their expression in the arrangements made recently that aim at the adjustment of international treaties and national laws to the changed monetary situation. With respect to various treaties in which the franc is used as unit of account, amending protocols were adopted, such as the one already mentioned, that prescribe that the franc be considered equal to 1/15 SDR for conversion into national currency; the same applies with respect to the adjustment legislation adopted in several countries and, likewise, the aforementioned draft bill opted for this solution.

14. Objecting to conversion of the franc on the basis of 1/15 SDR, the State submitted that the value of the SDR

in terms of purchasing power had considerably declined since the time when this unit was still expressed in the aforementioned weight of gold; as a consequence thereof, conversion of the franc on the aforementioned basis leads to a real reduction, which cannot be neglected, in the liability limits provided for in the Treaty and in Article 740*d*. This circumstance cannot, however, become a decisive factor when the judge makes his choice on how to fill the lacuna. Even if the aforementioned limits would require revision in connection with the decline of the purchasing power of the unit of account to be applied, it is not the task of the judge to provide for this, but it is up to the legislative body of the treaty and/or the national legislator to intervene.

It is worth noting, in this connection, that on November 19, 1976, a Treaty was concluded in London—which has not yet taken effect, however—on the limitation of liability for maritime claims (*Journal of Treaties* 1980, 23). This Treaty is intended to replace the Treaty of 1957 and contains considerably higher limits of liability, expressed in SDRs.

15. The fact that Part b. of the grievance, insofar as it concerns the complaint described hereinabove at the end of point 7, is founded, implies that the decision of the Court of Appeal cannot be upheld, insofar as the Court of Appeal held that it could abstain from making a decision on the point in dispute between Giants and the State concerning the conversion criterion to be applied. The Supreme Court can settle the case itself.

It follows from the above considerations concerning the conversion criterion, that grievance 1 of the appeal is founded, insofar as it argues that the franc is to be considered equal to 1/15 SDR for the purpose of conversion. No appeal to the Supreme Court was made against the decision of the Court of Appeal on grievance 2.

The above leads to the conclusion that the decision of the Court of Appeal only need be completed to the extent that it is necessary to state the criterion—mentioned below—for the conversion of the amount in francs mentioned by the Court of Appeal;

Annuls the decision of the Court of Appeal, but only insofar as the Court of Appeal omitted to state the criterion according to which the relevant amount in francs is to be converted;

Fixes the amount to which Giants' liability is limited for the moment, at the countervalue in Netherlands currency of 12,764,810 francs fixed at 65.5 milligrams gold of 900/1000 fineness, this franc to be considered equal to 1/15 Special Drawing Right as it is defined by the International Monetary Fund, and at the rate of the day on which security is furnished, to be converted in Netherlands currency in accordance with the valuation method applied by the Fund for its own operations and transactions;

Rejects the appeal in all other respects.

So done by Deputy Chief Justice Ras and Justices Haardt, Royer, Martens and de Groot, and so pronounced by the aforementioned Mr. Haardt, Attorney, in public session on the first of May nineteen hundred and eighty-one, in the presence of the Attorney-General.

(signatures)

(signature)

.....

(Rubber stamp:
Certified true copy)

*The Clerk of the Supreme Court
of the Netherlands*

(signature)

.....

CERTIFICATION

I, Irwin K. Styles, of ALL-LANGUAGE SERVICES, INC.,
545 Fifth Avenue, New York, New York 10017, hereby certify
that the foregoing is a true and faithful translation of the original
document.

IRWIN STYLES

State of New York SS.:
County of New York

Sworn to before me this 28th day of July, 1981

BARNEY ROSE,
NOTARY PUBLIC State of New York
No. 41-3343010, Qual. in Queens Co.
Cert. Filed in N. Y. County.
Commission Expires March 30, 1983

FOR INFORMATION

CIVIL AERONAUTICS BOARD MEMORANDUM

May 20, 1981

TO: The Board

FROM: Director, Bureau of Compliance and Consumer Protection

CC: Director, Bureau of International Aviation
Director, Bureau of Domestic Aviation
General Counsel

SUBJECT: Warsaw Convention Liability Limits

For more than a year now, various components of the Board's staff have been considering the question of how the liability limitations contained in the Warsaw Convention should be converted to dollars. The question is a troublesome one, and the memoranda exchanged among the staff have not reached the same conclusions of this issue.¹ There is considerable interest in the final resolution of this matter among parties outside the Board, including some involved in litigation where the amount of potential liability is a significant issue.

The Board has never taken a position as to which liability limitation level is correct, and the Bureau of Compliance and Consumer Protection recommends that the Board decline to take any position which would affect the determination of liability limits until the matter has been further refined at the staff level. Any policy recommendation that would come from the staff should be communicated to the Departments of Transportation and State as well in the hope of reaching interagency agreement.

¹ This Bureau wrote the first memorandum in March, 1980. BIA and BDA wrote reply memos in April, 1980.

This memorandum contains BCCP's reappraisal of the problem and is intended to initiate a fresh start in addressing the question at the Board.

I. Background

The Warsaw Convention was signed at Warsaw, Poland, on October 12, 1929, and ratified by the United States Senate on July 31, 1934.^{1a} Among its most compelling purposes were the protection of the fledgling aviation industry from potentially ruinous damage judgments and the assurance of some reliable and consistent basis for recovery for injury or damage to persons or property.² Thus the Convention (a) enunciated carriers' liability for personal injuries (Article 17), damage or loss of baggage and other property (Article 18), and damage due to delay (Article 19) subject to affirmative defenses which could be proved by a carrier, *i.e.*, the carrier's freedom from fault (Article 20) or the injured person's contributory fault (Article 21); (b) provided a limitation on the extent of liability (Article 22); and (c) nullified any provision tending to relieve a carrier of any such liability or to fix a lower limit (Article 23). In addition, the Convention required carriers to provide notice to the passengers in the form of a ticket or baggage check with respect to, *inter alia*, the limitations on liability, and barred defenses permitted by the Convention, including the limitation of liability, if carriers accept passengers or baggage without delivering the required ticket or baggage check (Articles 3 and 4).

The Board has implemented Articles 3 and 4 by specifying the notice carriers must provide concerning the liability limits. 14 C.F.R. Sections 221.175 and 221.176. Carriers also include the liability limits in tariffs filed with the Board, as required by

1a. 49 Stat. 3000.

2. Lowenfeld and Mendelsohn, *The United States and the Warsaw Convention*, 80 Harv.L.Rev. 497, 498-500 (1967). See also Horner & Legrez, *Minutes, Second International Conference on Private Aeronautical Law, Warsaw 1929* (Fred B. Rothman & Co. 1975), pp. 38, 40-41.

Section 403 (a) of the Act and Part 221.3 of the Board's Regulations. The Board has also been an active participant in Congressional hearings concerning possible amendments to the Convention.

In March, 1980, our former Policy Development Division sent the Board a memo suggesting that carriers are violating the Warsaw Convention by asserting liability limits much lower than those actually permitted by the Convention. These limitations are expressed in terms of gold and have always been converted to dollars by use of the official rate of gold. Since there no longer is an "official" price for gold in the U.S., the memorandum suggested that the market value of gold has to be used in converting the liability limits to dollars.

BIA and BDA have written memos responding to this suggestion. Each response posed two major objections, *i.e.*, (1) that the recommendation is inconsistent with the intention of the Warsaw signatories and (2) that it is inconsistent with IMF amendments establishing "Special Drawing Rights" tied to a basket of 16 currencies, rather than gold, as the basic unit of account for converting currencies. The Board has not taken any action on the recommendation.

II. Discussion

In 1929, when the Warsaw Convention was adopted, currencies were either expressed in gold or easily convertible to gold using an official rate. From 1933 to 1974, gold ownership in the United States was legal only for a small class of uses, such as jewelry-making and dentistry. The price of gold in these transactions was dictated by the government's official price, since it was the government's policy to buy and sell gold at that rate. A private buyer would thus not pay more than the official rate because he could buy it from the government at that price and, conversely, a private seller would not accept less than the official rate because he could sell it to the government for that amount.

The drafters of the Warsaw Convention thus foresaw no ambiguity in their use of gold as the unit of account because at the time

governments had an official rate of gold which was easily discernible and virtually identical to the market rate of gold, to the extent that a market rate existed at all. Seeing no ambiguity, they never addressed the question of whether the official or market rate should be used in converting the limits to national currencies. To determine how the limits should be converted now that there is no official rate, one must attempt to determine what is most consistent with the purpose of the limitation on liability.

The primary purpose of the liability limits in the Warsaw Convention is the protection of carriers from unforeseeable and unlimited liability. At the time of the Convention, it was feared that carriers would refuse to carry passengers and/or cargo unless they could measure the scope of risk they were assuming. The limits were thus intended to provide a measure of predictability for carriers so that they could operate free from the fear of unlimited liability.

The use of gold as the unit of account was intended "to avoid, as far as the limits are concerned, the effects of devaluations which would result from having the limits expressed in any local currency."³ The use of gold was thus seen as providing more stability than any national currency could, further promoting the predictability the limits were intended to provide. This was because national currencies were subject to devaluation by their country, whereas the value of gold was not subject to change as the result of a single country's unilateral action.

There can be no doubt that use of the official rate of gold produces results more consistent with these purposes than use of

3. H. Drion, *Limitations of Liabilities in International Air Law* 1954, p. 183. Other writers agree but add that the use of gold was also intended to assure that damages awarded by different countries would have a uniform value and to provide stability in terms of the purchasing power represented by the limits. Bristow, "Gold Franc - Replacement of Unit of Account," LMCLQ 31 (1978); Asser, "Golden Limitations of Liability in International Transport Conventions and the Currency Crisis," 5 J. Maritime L. and Com. 645 (1973-74); Norway, "Conversion from Poincare Franc to National Currency," presented to the 1974 meeting of ICAO's Legal Committee, and Tobolewski, "The Special Drawing Right in Liability Conventions: an Acceptable Solution?" 2LMCLQ 169, 171 (1979).

the market rate. The official rate of gold, at least in the United States, fluctuated only rarely. Even in countries whose currencies were devalued more frequently, the official rate would provide greater predictability and stability than the market rate. This is especially true now, since speculation has led to wildly fluctuating market prices of gold.

Use of an official rate is supported by the approach adopted in more recent Conventions, when the ambiguity of expressing limits in terms of gold was more apparent. Both the Convention Concerning Liability for Oil Pollution, signed in Brussels in 1969, and the Convention Relating to the Limitation of the Liability of the Owners of Inland Navigation Vessels, signed in Geneva in 1973, expressly provided for the use of the official value of gold in setting liability limits.⁴ Conversion by the official rate is further bolstered by the fact that a majority of courts have used it in converting Warsaw's limits after the official and market rates began to diverge.⁵ ICAO also passed a resolution in 1974 opposing the use of the market price of gold in converting Warsaw's limits, which provides a strong indication of how other participating countries feel.⁶

Since it appears that stable limits were of paramount importance to the drafters of the Convention, basing them on the market value of gold would be inconsistent with the Convention. Since there is no longer an official rate of gold in the United States, however, it is not entirely clear how the limits should be converted.

In 1975, the Warsaw signatories attempted to deal with the changes in the role of gold in international monetary transactions. Their answer, embodied in the Montreal Protocol, was the substitution of Special Drawing Rights (SDR's) for gold as the basis for conversion. The SDR is a creation of the International Monetary Fund (IMF), the agency which establishes the basic

4. The Legal Committee of ICAO, *Resolution Concerning the Conversion of Poincaré Francs to National Currencies in the Warsaw and Rome Conventions*, 1974.

5. Tobolewski, "The Special Drawing Right in Liability Conventions: An Acceptable Solution?" 2 LMCLQ 169, 171 (1979).

6. See footnote 4.

ground rules for currency transactions between member countries. Use of SDR's by the Montreal signatories was presumably intended to eliminate the confusion over how the Warsaw limits should be converted from gold to national currencies. With no official rate of gold and a fluctuating market rate which would produce results at odds with the Convention's purposes, the Montreal signatories chose to abandon gold in favor of SDR's because SDR's provided the stability and ease of conversion which had attracted the Warsaw signatories to choose gold as the unit of account.

The United States supported the SDR approach at Montreal and signed the Montreal Protocol.⁷ If the Senate had ratified the Protocol, the SDR approach would be law and there would be no problem in determining Warsaw's limits. The Senate has not ratified the Protocol, however, although it was submitted for ratification in January, 1977. Its failure to either ratify or reject the Protocol makes determination of the proper conversion rate difficult because (1) as explained above, use of the market rate of gold produces results inconsistent with the Convention's purposes, (2) there is no current official rate of gold and (3) the United States is obligated by international law to refrain from acts which would defeat the object and purpose of the Montreal Protocol.⁸

To fulfill its obligation to observe, to the extent possible, the requirements of both the Warsaw Convention and Montreal Protocol, the Board has for the past five years been engaging in a legal fiction. Unable to use the SDR approach because Montreal has not been ratified and constrained from using the market price of gold because doing so would defeat the object and purpose of both Montreal and Warsaw, the Board has continued to convert

7. Fitzgerald, "The Four Montreal Protocols to Amend the Warsaw Convention Regime Governing International Carriage by Air," 42 J. Air L. & Comm. 273, 325, 329-30 (1976).

8. Article 18, Vienna Convention on the Law of Treaties, requires a country to refrain from acts which would defeat the purpose and object of a treaty it has signed until it makes clear its intention not to become a party. This obligation applies even when the treaty was signed subject to ratification and has not yet been ratified.

Warsaw's limits based on the official rate of gold immediately preceding the elimination of all ties between gold and the dollar.⁹ This approach produces the greatest degree of stability possible since the dollar limits will remain constant unless and until the United States reestablishes ties between gold and the dollar.

We believe that the Board's current course of action is superior to any of the alternatives currently available. Use of the last official rate of gold, however, may at times prevent passengers from recovering the full extent of damages caused by carriers.¹⁰ Carriers may no longer need the protection of these low limits, given the maturation of the aviation industry since 1929.

Because of the confusion inherent in converting Warsaw's limits when there is no official rate of gold and the equitable considerations raised by the low limits currently in force, we believe the Board should develop a coherent policy resolution of the questions, and then meet with the Departments of Transportation and State to review this problem. These agencies will be solely responsible for enforcing Warsaw in the future and have participated actively in formulating U.S. policy in this area in the past. Pending resolution of this issue by the three agencies we believe the Board should take no action which would disturb the conversion formula now contained in sections 221.175 and 221.176 of the regulations.

JOHN GOLDEN

John Golden

Prepared by:

STEVEN ROTHENBERG

Ext. 3-5943

9. Thus, the notice of Warsaw's limits required by Parts 221.175 and 221.176 of the Board's Regulations is based on conversion at this rate.

10. The limits are \$9.07 per pound for checked luggage, \$400 for carry-on bags and approximately \$10,000 per passenger. The \$10,000 limit is superseded, however, by a \$75,000 limit adopted by carriers in 1966.

Respectfully submitted,

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(212) 696-6000
*Counsel for Petitioner,
Trans World Airlines, Inc.*

CURTIS, MALLET-PREVOST,
COLT & MOSLE
SCOTT J. MCKAY WOLAS
MICHAEL L. M. QUINTTUS
Of Counsel

January 15, 1983

In The

FILED

Supreme Court of the United States

October Term, 1983

AUG 29 1983

TRANS WORLD AIRLINES, INC., *Petitioner,*

ALEXANDER L. STEVENS,
CLERK

v.

FRANKLIN MINT CORPORATION, FRANKLIN
MINT LIMITED, and McGREGOR, SWIRE AIR
SERVICES LIMITED, *Respondents.*

—

FRANKLIN MINT CORPORATION, FRANKLIN
MINT LIMITED, and McGREGOR, SWIRE AIR
SERVICES LIMITED, *Petitioners,*

v.

TRANS WORLD AIRLINES, INC., *Respondent.*

—

On Writs of Certiorari To The United States
Court of Appeals For The Second Circuit

—

JOINT APPENDIX

—

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O'REGAN, P.C.
Of Counsel

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SCOTT J. MCKAY WOLAS
MICHAEL L. M. QUINTUS
Of counsel

August 29, 1983

PETITION FOR CERTIORARI IN No. 82-1186 FILED
JANUARY 15, 1983;

PETITION FOR CERTIORARI IN No. 82-1465 FILED
MARCH 1, 1983.

CERTIORARI GRANTED IN BOTH No. 82-1186 AND No. 82-1465
JUNE 13, 1983.

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<i>Deere & Co. v. Deutsche Lufthansa, AG</i> , No. 81 C 4726 (N. D. Ill. Dec. 30, 1982) (Appendix to TWA Petition No. 82-1186, at A-61)	
<i>In re Aircrash at Kimpo International Airport, Korea on November 18, 1980</i> , 558 F. Supp. 72 (C. D. Cal. 1983) (Appendix to Franklin Mint Petition No. 82-1465, at A29), <i>motion for interlocutory review denied</i> , No. 83-8051 (9th Cir. May 13, 1982)	
<i>Maschinenfabrik Kern, A.G. v. Northwest Airlines, Inc.</i> , 562 F. Supp. 232 (N. D. Ill. 1983) (Appendix to TWA's Respondent's Brief on Franklin Mint Petition No. 82-1465, at A-1)	
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Nos. 82-1186, 82-1465

—o—
In The
Supreme Court of the United States
October Term, 1983
—o—

TRANS WORLD AIRLINES, INC., *Petitioner,*
v.
FRANKLIN MINT CORPORATION, FRANKLIN
MINT LIMITED, and McGREGOR, SWIRE AIR
SERVICES LIMITED, *Respondents.*

—o—
FRANKLIN MINT CORPORATION, FRANKLIN
MINT LIMITED, and McGREGOR, SWIRE AIR
SERVICES LIMITED, *Petitioners,*
v.
TRANS WORLD AIRLINES, INC., *Respondent.*
—o—

On Writs of Certiorari To The United States
Court of Appeals For The Second Circuit
—o—

JOINT APPENDIX
—o—

DOCKET ENTRIES

United States District Court
For the Southern District of New York

Date	NR	Proceedings
03/20/81	1	Filed complaint, issued summons and notice purs. to 28 USC 636(c).
03/23/81	2	Filed amended complaint.
04/6/81	3	Filed summons w/Marshals ret-Svd-Trans- World Airlines by cert. mail with return re- ceipt signed by John (illegible) on 3/31/81. Attys for deft.
04/6/81	4	Filed addtl summons w/Marshals ret-Svd- Trans-World Airlines by cert. mail with re- turn receipt signed by John M. on 3/31/81. Attys for deft.

JA2

Date	NR	Proceedings
04/22/81	5	Filed Stip & Order ext time for deft to answer to 5/20/81. KNAPP, J.
05/20/81	6	Filed ANSWER to amended complaint.
06/30/81		PRE-TRIAL CONFERENCE HELD BY WK.
07/01/81	7	Filed Stip & Order deft shall have to 7/31/81 to file a motion for partial S/J. Oral argument shall be heard on 10/16/81. KNAPP, J.
07/31/81	8	Filed deft.'s notice of motion for partial summary judgment ret: 10/16/81.
07/31/81	9	Filed memo of law in support of deft.'s motion for partial summary judgment.
09/1/81	10	Filed memo of law in opp. to deft.'s motion for partial summary judgment.
09/1/81	11	Filed affdvt of John R. Foster in opp. to deft.'s motion for partial S/J.
09/14/81	12	Filed affdvt of W. H. Clarke in support of TWA's motion for partial S/J.
09/14/81	13	Filed reply memo of law in support of deft.'s motion for partial S/J.
10/5/81	14	Filed supplemental memo of law in opp. to deft.'s motion for partial S/J.
10/5/81	15	Filed affdvt of J. R. Foster in opp to motion for partial S/J.
11/12/81	16	Filed MEMORANDUM & ORDER . . . Let counsel for TWA submit a proposed order on ten days notice. As we understand the stipulation of the parties, such an order would effect direct that judgment be entered for plaintiff in the amount of \$6,475.98 plus interest and costs, a result which would per-

Date	NR	Proceedings
		mit immediate appeal from this order. Knapp, J. mailed copies.
12/14/81	17	Filed notice of motion for an order purs to Rule 59(e) of FRCP amending the Court's Order and Judgment of 12/3/81, noticed for 1/8/82.
12/14/81	18	Filed plttf's memo in support of their motion for an amended judgment.
12/16/81		Filed Memo End on doc. #17—Motion Denied. KNAPP, J.
12/23/81	19	Filed Order amending the 2nd paragraph of our Memo & Order dtd 11/6/81 to read, "Article 22 of the Warsaw convention provides that, unless a special declaration of value is made at the time of a delivery, a carriers liability for checked baggage and goods is limited to the equivalent of 250 francs per kilogram". KNAPP, J. CSC
12/4/81	20	Filed Order & Judgment #81,1379—final judgment entered for plttfs in the amount of \$6,475.98 plus interest and costs. KNAPP, J. JUDGMENT ENTERED—12/4/81 Raymond F. Burghardt Clerk
12/30/81	21	Filed notice of appeal to the USCA fr the final judgment entered in this action on 12/4/81. Copies mailed to Curtis Mallet-Prevost Colt & Mosle.
1/4/82		Copies of notice of appeal and district court docket entries on behalf of Franklin Mint Corporation, et al. filed. (fees paid)
1/5/82		Appellants Franklin, et al. Form C filed, pfs.
1/5/82		Appellants Franklin, et al. Form D filed, pfs.
1/20/82		Civil Appeal Scheduling Order #1 filed, P.C.

JA4

Date	NR	Proceedings
1/26/82		Record on appeal (original papers of district court) filed.
2/4/82		Scheduling Order #2 filed.
2/25/82		Appellants Franklin Mint Corporation, et al. motion for admission of attorney PRO HAC VICE filed, pfs.
2/26/82		Appellants Franklin Mint Corporation, et al. brief filed, pfs.
2/26/82		Appellants Franklin Mint Corporation, et al. joint appendix filed, pfs.
2/26/82		Appellants Franklin Mint Corporation, et al. addendum to brief filed, pfs.
3/1/82		Appellee-Respondent of U.S.C.A. #82-8018 motion for consolidation of appeals in 82-8018 and 82-7012 filed, pfs. (filed in 82-8018)
3/2/82		Appellants Franklin Mint, et al. affidavit in opposition to motion to consolidate filed, pfs. (filed in 82-7012)
3/2/82		Answer to the petition of plaintiff Robles for permission to cross-appeal filed, pfs. (filed in 82-8018)
3/2/82		Order granted appellants Franklin Mint, et al. motion for admission of attorney John Foster pro hac vice filed. (endorsed on motion filed 2/25/82) (Clerk)
3/4/82		Order denied, appellees motion for consolidation of appeals in 82-7012 & 82-8018. If the petition to appeal is granted in docket 82-8018, that appeal may be submitted to the same panel which hears 82-7012, but only if time and circumstances permit. (endorsed on motion filed 3/1/82) (LWP). (filed in 82-8018)

Date	NR	Proceedings
3/4/82		Amicus Curiae Roulin & Harley motion for enlargement of time to file amicus brief filed, pfs.
3/4/82		Amicus Curiae Roulin & Harley motion for leave to intervene as amicus curiae filed, pfs.
3/4/82		Amicus Curiae Roulin & Harley amicus curiae brief <i>received</i> , pfs.
3/8/82		Order denied amicus curiae motion for enlargement of time to file brief filed (endorsed on motion of 3/4/82) (LWP).
3/8/82		Order denied amicus curiae Roulin & Harley motion for leave to intervene as amicus curiae filed (endorsed on motion of 3/4/82) (LWP).
3/22/82		Amicus Curiae Roulin & Harley motion for review by Court of denial of motion to file as amicus Brief, pfs. filed.
3/26/82		Appellee TWA brief filed, pfs.
3/26/82		Appellee TWA addendum to brief filed, pfs.
3/31/82		Order granted motion for review by court of denial of motion to file as Amicus Curiae Roulin & Harley (endorsed on motion of 3/22/82) filed. (IRK, WRM, RJC) ("The brief may be filed but the panel hearing this case will decide whether oral argument is necessary")
3/31/82		Amicus Curiae Roulin & Harley amicus brief filed, pfs.
04/12/82		Appellant Franklin Mint, et al. reply brief filed [w/pfs.] [by mail].
4/22/82		Case argued before: Oakes, Cardamone, Winter, CJJ.

JA6

- 9/28/82 Judgment affirmed by published, signed opinion, Winter.
- 9/28/82 Judgment filed.
- 10/12/82 Appellee TWA petition for rehearing with a suggestion for rehearing en banc, pfs, filed.
- 11/09/82 Movant International Air Transport Association motion for leave to file an amicus brief in support of Appellee's Petition for Rehearing en banc filed (w/pfs.) (see order dated 11-10-82).
- 11/10/82 Order granted, movant Air Transport Association motion for leave to file an amicus brief and permission to file brief out of time in support of Appellee's Petition for Rehearing filed (FXG for JLO).
- 11/10/82 Movant Air Transport Amicus Brief in support of Petition for rehearing filed (w/pfs.).
- 12/1/82 Order denying appellee TWA petition for a rehearing with a suggestion for rehearing en banc, filed.
- 12/7/82 Appellee TWA motion to stay the issuance of the mandate filed (w/pfs.) (see order filed 12-17-82).
- 12/17/82 Order granted appellee TWA motion for stay of mandate filed (JLO, RJC, RK).
-

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

81 Civ. 1700 (WK)

AMENDED COMPLAINT

FRANKLIN MINT CORPORATION, FRANKLIN
MINT LIMITED, and MCGREGOR, SWIRE
AIR SERVICES LIMITED,

Plaintiffs,

- against -

TRANS WORLD AIRLINES, INC.,

Defendant.

PLAINTIFFS DEMAND A JURY TRIAL
ON ALL ISSUES

Plaintiffs, Franklin Mint Corporation (hereinafter "Franklin"), Franklin Mint Limited (hereinafter "Limited"), and McGregor, Swire Air Services Limited (hereinafter ("MSAS")), by their attorneys, Waesche, Sheinbaum & O'Regan, complaining of the defendant, Trans World Airlines, Inc. (hereinafter "TWA"), allege as follows:

JURISDICTION AND VENUE

(1) Franklin is, and has been at all times pertinent hereto, a corporation duly organized and existing pursuant to the laws of the Commonwealth of Pennsylvania and with its principal place of business in the Commonwealth of Pennsylvania.

(2) Limited is, and has been at all times pertinent hereto, a corporation duly organized and existing pur-

suant to the laws of England and with its principal place of business in England.

(3) MSAS is, and has been at all times pertinent hereto, a corporation duly organized and existing pursuant to the laws of England and with its principal place of business in England.

(4) Upon information and belief, TWA is, and has been at all times pertinent hereto, a corporation duly organized and existing pursuant to the laws of the State of Delaware; with its principal place of business in the State of Missouri; and with a place of business within this District at 605 Third Avenue, New York, New York.

(5) This action arises under a treaty of the United States, specifically, the Convention for the Unification of Certain Rules Relating to International Transportation by Air (hereinafter "the Convention"), 49 Stat. 3000, T.S. No. 876, which was concluded on October 12, 1929, and which was adhered to by the United States on June 27, 1934.

(6) The amount in controversy, exclusive of interest and costs, exceeds the sum of \$10,000.00.

(7) This Court has jurisdiction of this action under the provisions of 28 U. S. C. §§ 1331(a) and 1332(a).

AS AND FOR A CAUSE OF ACTION AGAINST TWA

(8) On or about March 24, 1979, in the City of Philadelphia, Commonwealth of Pennsylvania, there was shipped

by Franklin, and delivered to TWA, as a common carrier, four (4) packages of numismatic articles, all in good order and condition.

(9) Under its air waybill no. 015-6618-8776, TWA accepted said shipment which was delivered to it and, in consideration of certain agreed freight charges thereupon paid or agreed to be paid, agreed to transport and carry the said shipment to MSAS and Limited, London Heathrow Airport, Middlesex, England, and there deliver the same in like good order and condition as when received by TWA.

(10) Thereafter, in violation of its duty as a common carrier of merchandise by air for hire, its agreement with Franklin, MSAS, and Limited, and its obligations under the Convention, TWA permitted the said shipment to be lost or stolen while in the exclusive care, custody, and control of TWA and its duly authorized agents; and, as a direct result thereof, the said shipment was never delivered at the place of destination.

(11) Franklin is the consignor and MSAS and Limited are the consignees of the shipment described above and bring this action on their own behalf and, as agent and trustee, on behalf of and for the interest of all parties who are, or may become, interested in said shipment and the loss thereof as their respective interests may ultimately appear, and plaintiffs are entitled to maintain this action.

(12) By reason of the aforesaid, plaintiffs have sustained damages in the amount of \$250,000.00, no part of which has been paid although duly demanded.

WHEREFORE, plaintiffs demand judgment against TWA:

- (a) for the sum of \$250,000.00;
- (b) for interest from March 24, 1979;
- (c) for the costs and disbursements of this action;
and
- (d) for such other, and further, relief as to this Court seems just and proper.

Dated: New York, New York
March 23, 1981.

Waesche, Sheinbaum & O'Regan
Attorneys for Plaintiff
By: /s/ Lou P. Sheinbaum
A Member of the Firm

Office and P. O. Address:
120 Broadway, Suite 1825
New York, New York 10271
(212) 227-3550

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
(Title omitted in printing)

ANSWER TO AMENDED COMPLAINT

Defendant, Trans World Airlines, Inc. ("TWA"), by its attorneys, Curtis, Mallet-Prevost, Colt & Mosle, for its answer to the amended complaint:

WITH RESPECT TO JURISDICTION
AND VENUE

1. Denies that it has knowledge or information sufficient to form a belief as to the truth of the averments in paragraphs "1," "2," and "3."

2. Denies the averments in paragraph "4," except states that TWA is a Delaware corporation with a place of business in this district at 605 Third Avenue, New York, New York.

3. Denies the averments in paragraph "5" insofar as those averments assert that this action is properly brought; however states that this action purports to be brought under the Convention for the Unification of Certain Rules Relating to International Transportation by Air ("Warsaw Convention").

4. Denies that it has knowledge or information sufficient to form a belief as to the truth of the averments in paragraphs "6" and "7", except states that plaintiffs purport to invoke the federal question and diversity jurisdiction of this Court.

WITH RESPECT TO THE FIRST
CAUSE OF ACTION

5. Denies knowledge or information sufficient to form a belief as to the truth of the averments in paragraphs "8" and "9," except states that on or about March 23, 1979, TWA accepted a shipment of four (4) packages in Philadelphia, Pennsylvania under waybill no. 015-6618-8776 for delivery to McGregor, Swire Air Services Limited at London Heathrow Airport, England, for Franklin Mint Limited.

6. Denies the averments in paragraph "10," except states that the shipment was never delivered.

7. Denies knowledge or information sufficient to form a belief as to the truth of the averments in paragraph "11."

8. Denies the averments in paragraph "12."

FIRST AFFIRMATIVE DEFENSE

9. The liability of TWA, if any, is limited in accordance with its tariffs filed with the Civil Aeronautics Board.

SECOND AFFIRMATIVE DEFENSE

10. The shipment referred to in the complaint was "international transportation" as defined in Article 1 of the Warsaw Convention and TWA claims all the defenses available to it under the applicable provisions of that Convention including a monetary limit of liability of \$20 per kilogram.

THIRD AFFIRMATIVE DEFENSE

11. Pursuant to Article 20 of the Warsaw Convention, TWA took all necessary measures to avoid the damage alleged in the complaint or it was impossible for it to take such measures. Therefore, TWA is not liable to plaintiffs.

FOURTH AFFIRMATIVE DEFENSE

12. Plaintiffs' causes of action are barred by the two year limitations period of Article 29 of the Warsaw Convention.

FIFTH AFFIRMATIVE DEFENSE

13. The damage claimed, if any, was caused by or contributed to by plaintiffs' negligence.

SIXTH AFFIRMATIVE DEFENSE

14. Through their conduct, plaintiffs assumed the risk of any loss.

WHEREFORE, defendant Trans World Airlines, Inc. requests judgment dismissing the complaint, together with the costs and disbursements of this action.

Dated: New York, New York

May 19, 1981

Curtis, Mallet-Prevost, Colt & Mosle

By /s/ Robert S. Lipton
A Member of the Firm
Attorneys for Defendant
Trans World Airlines, Inc.
100 Wall Street
New York, NY 10005
(212) 248-8111

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
(Title omitted in printing)

STIPULATION AND PRE-MOTION ORDER

WHEREAS, Counsel for all parties in this action appeared before the Court at a pre-motion conference on June 30, 1981;

IT IS HEREBY STIPULATED AND AGREED, by and between the undersigned, Counsel for the parties hereto, that defendant shall have until July 31, 1981 to serve and file a motion for partial summary judgment together with papers in support thereof; plaintiffs shall have until August 31, 1981 to serve and file papers in opposition to said motion; defendant shall have until September 14, 1981 to serve and file reply papers; and plaintiffs shall have until September 28, 1981 to serve and file supplemental papers.

Oral argument on the motion shall be heard at 2 p.m.
s/wk on October 16, 1981.

IT IS HEREBY FURTHER STIPULATED AND
AGREED, that the following facts are not in dispute:

1. Plaintiff Franklin Mint Corporation ("Franklin")
is a corporation organized and existing pursuant to the
laws of Pennsylvania with its principal place of business
there. It is engaged in business as a dealer in numismatic
articles.

2. Plaintiff Franklin Mint Limited ("Limited") is
a corporation organized and existing pursuant to the laws
of England and with its principal place of business there.
It is engaged in business as a dealer in numismatic articles.

3. Plaintiff McGregor, Swire Air Services Limited
("MSAS") is a corporation organized and existing pur-
suant to the laws of England and with its principal place
of business there. It is engaged in business as a freight
agent.

4. Defendant Trans World Airlines, Inc. ("TWA")
is a Delaware corporation with a principal place of busi-
ness in New York. It is engaged in business as, among
other things, a carrier by air of cargo.

5. On March 23, 1979, in Philadelphia, Pennsylvania,
Franklin, as shipper, delivered to TWA as common car-
rier, four packages said to contain:

"1 COS: METAL STAMPING DIES
METAL STAMPINGS NUMISMATIC
ARTICLES OF ADORNMENT
3 CTN: METAL STAMPINGS NUMISMATIC."

6. The total weight of the four packages was 714 lbs., and the total freight charge was \$544.96.

7. The total value of the four packages was in excess of \$6,500.00.

8. Franklin made no special declaration of value for carriage at the time of delivery to TWA of the four packages.

9. TWA accepted this shipment of four packages for delivery to MSAS at London Heathrow Airport, England, for Limited.

10. TWA accepted this shipment under its air waybill no. 015-6618-8776.

11. The shipment of four packages was lost or stolen and never delivered to destination.

IT IS HEREBY FURTHER STIPULATED AND AGREED, that the following legal conclusions are not in dispute:

1. The Convention for the Unification of Certain Rules Relating to International Transportation by Air ["the Warsaw Convention"], 49 Stat. 3000, T.S. No. 876, governs the legal relations of the parties because the carriage involved was "international transportation" as defined in Article 1 of the Warsaw Convention.

2. TWA is liable for the loss of the four packages in accordance with Article 18 of the Warsaw Convention, subject to a limitation of such liability in accordance with Article 22 of the Warsaw Convention.

3. No other basis for liability nor other basis for defense is applicable to this action. The sole issue to be

determined in this motion is the maximum amount of TWA's liability, exclusive of interest and costs, pursuant to Article 22 of the Warsaw Convention.

IT IS HEREBY FURTHER STIPULATED AND AGREED, that in the event the Court determines that the maximum amount of TWA's liability in this action is in excess of \$6,500.00, plus interest and costs, the issue of the actual quantum of plaintiffs' damages will be determined in accordance with the pre-trial, trial, and post-trial provisions of the Federal Rules of Civil Procedure.

IT IS HEREBY FURTHER STIPULATED AND AGREED, that defendant's motion for partial summary judgment shall be based upon this order.

Waesche, Sheinbaum & O'Regan

By /s/ Lou P. Sheinbaum
A Member of the Firm
Attorneys for Plaintiffs
120 Broadway, Suite 1825
New York, NY 10271
(212) 227-3550

Curtis, Mallet-Prevost, Colt & Mosle

By /s/ Robert S. Lipton
A Member of the Firm
Attorneys for Defendant
100 Wall Street
New York, NY 10005
(212) 248-8111

SO ORDERED 6/30/81

s/
Whitman Knapp
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
(Title omitted in printing)

NOTICE OF MOTION FOR PARTIAL
SUMMARY JUDGMENT

PLEASE TAKE NOTICE that, pursuant to Rule 56 of the Federal Rules of Civil Procedure, the Stipulation and Pre-Trial Order dated June 30, 1981, the Affidavit of Clive Douglas Bull sworn to July 27, 1981, the Affidavit of John N. Romans sworn to July 29, 1981 (the "Romans Affidavit"), and all the prior pleadings and proceedings had in this action, the undersigned will move this Court before the Honorable Whitman Knapp, United States District Judge, at the United States Courthouse, Foley Square, New York, New York, on October 16, 1981 at 2:00 P.M. or as soon thereafter as counsel may be heard, for an order granting Defendant Trans World Airlines, Inc. ("TWA") partial summary judgment limiting TWA's maximum liability in this action in accordance with the limitation of liability expressed in Article 22 of the Warsaw Convention converted into U. S. dollars by means of Special Drawing Rights and for such alternative and further relief as this Court deems just and proper;

PLEASE TAKE FURTHER NOTICE that, pursuant to Rule 44.1 of the Federal Rules of Civil Procedure, TWA will rely on certain foreign statutes, case law, and legal materials, copies and certified translations of which are annexed as Exhibits to the Romans Affidavit.

Dated: New York, New York
July 31, 1981

Curtis, Mallet-Prevost, Colt & Mosle
By /s/ Robert S. Lipton
A Member of the Firm
Attorneys for Defendant
100 Wall Street
New York, New York 10005
(212) 248-8111

TO: Waesche, Sheinbaum & O'Regan
Attorneys for Plaintiffs
120 Broadway, Suite 1825
New York, New York 10271
(212) 227-3550

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
(Title omitted in printing)

AFFIDAVIT

State of New York, County of New York, ss.:

CLIVE DOUGLAS BULL, being duly sworn deposes
and says:

1. I am Assistant Professor of Economics in the Department of Economics of New York University specializing in monetary theory and international economics. I received my Bachelors Degree with First Class Honors in Politics, Philosophy, and Economics, from Oxford University, England. Thereafter, I received my Doctorate in Economics from the University of California at Los Angeles. Prior to joining the faculty of New York University, I was lecturer with the Department of Economics at the California State University at Northridge.

2. I have been requested by Curtis, Mallet-Prevost, Colt & Mosle, counsel to the defendant herein, to indicate my opinion as to the comparative stability in the value of gold and Special Drawing Rights. That opinion, as well as the premises upon which it is based, is detailed below.

3. Although gold was once a monetary unit, it is now simply a commodity. It has no official monetary value and is freely traded in the United States and, indeed, in many other countries in the same manner as any other commodity, such as wheat, silver, soybeans or pork bellies. As such it can be expected to fluctuate widely in value from time to time due to normal market forces of supply and demand as well as to a wide variety of political developments. For example, recent political unrest, such as the invasion of Afghanistan, the holding of American hostages in Iran and the Iranian-Iraqi war, have all contributed to a wide fluctuation in the value of gold.

4. Prior to its demonetization, the role of gold was redefined to meet changing conditions. An international gold exchange system developed following the First World War. This system, under which sterling and the dollar were tied to gold, was set up and maintained in the 1920s (when the Warsaw Convention was drafted) by collaboration between the United States Federal Reserve Board, the Bank of England, and other European central banks.

5. In 1944, an international monetary system was created to provide financial stability in international markets. The basic tenets of this system were developed at the Bretton Woods Conference, and were subsequently embodied in the Articles of Agreement of the International Monetary Fund ("IMF"). Affiliated with the United

Nations, the IMF was organized to promote international monetary cooperation, facilitate the expanded and balanced growth of international trade, promote exchange stability and to help establish a multilateral system of payments for currency transactions among member States. Thus, the overall aim of the IMF is to minimize imbalances in the international balance of payments of any of its members and to tide them over temporary deficits. As originally conceived, a member with a balance of payments deficit could borrow foreign currency from the IMF in exchange for its own currency; it was then obligated to repurchase that currency within three or five years with gold or some other currency acceptable to the IMF. Under that system, the par value of most nations' currencies was fixed and expressed directly in terms of gold, or indirectly in terms of the U.S. dollar which itself was expressed in terms of gold. Thus, a nation's central bank would agree to use its gold and foreign exchange reserves in settlement of its foreign exchange obligations at a set par value. For example, for many years the United States agreed to buy or sell gold to the monetary authority of any nation at the rate of 0.888671 gram of gold per dollar or \$35 per ounce.

6. However, by the 1960's it became apparent that, for a variety of reasons, the monetary system created by the Bretton Woods Agreement was breaking down. The world's, and especially the United States', gold reserves could no longer support the international monetary system. First, the total of world gold reserves was unable to keep pace with total world economic activity: in 1958, the ratio of world gold reserves to the volume of imports stood at about 57 percent; by 1967 the ratio declined to 37

percent. Second, an increasing proportion of the world's reserves—over 40 percent in 1967— was held in the form of foreign exchange, nearly all of it in the form of United States dollars and British pounds. Third, the gold component of reserves depended in large part on production decisions in South Africa, on industrial uses, and on purchases by hoarders and speculators. None of these factors bore any rational relation to the needs of the world economy; together, they resulted in inadequate and declining amounts of gold available for reserves.

7. In 1968, in response to the problems discussed above, a "two tier" system was created. The major trading nations decided that they would no longer buy and sell their gold on the commodity markets to stabilize its price. Instead, official transactions concerning balance of payments would be undertaken at the then official price of gold, \$35 per ounce. Non-official transactions, such as the purchase of gold for jewelry, would be made on the commodity markets at a price which would be allowed to fluctuate according to the conditions of supply and demand and which in fact after 1970 diverged substantially from the official price of gold. As discussed below, the two-tier system with its differing official price and commodity price remained in effect until April 1, 1978.

8. During the 1960's a number of economists proposed that the international financial community create a wholly new asset which would have no competing uses as a commodity. In September 1967, the Board of Governors of the IMF approved the concept of the creation of Special Drawing Rights ("SDRs"). Under the IMF plan, a "Special Drawing Account" was established to facilitate

transactions among members, and SDRs became a supplement to existing reserve assets. Countries were allocated a number of SDRs, and a country having a balance of payments deficit could use them to settle its accounts by selling them to a country designated by the IMF. Designated countries are obligated to take SDRs and to provide convertible currency in return. Transactions are consummated simply by crediting and debiting the appropriate SDR account with the IMF.

9. SDRs were initially valued in terms of gold with one SDR equal to 0.888671 gram of fine gold—precisely equal to one U. S. dollar at its rate of \$35 per ounce. By 1975, however, in an attempt to ameliorate severe economic pressures resulting from instability in the commodity price of gold, the IMF developed a plan, the Jamaica Accords, to abolish the official price of gold, to delete most references to gold in its Articles of Agreement; and to replace the official role of gold with SDRs. That plan became effective on April 1, 1978 when the SDR/gold link was severed for almost all practical purposes. Thereafter, gold was no longer used by the IMF's membership as an international unit of account. Instead, the IMF's members undertook to collaborate with the IMF and with each other to make the SDR the principal reserve asset in the international monetary system as well as the principal international unit of account, thereby making SDRs a complete substitute for gold.

10. After the demonetization of gold, SDRs were valued on a weighted average of a "basket of 16 currencies." That average was weighted roughly in proportion to the exports of goods and services of the various countries.

On January 1, 1981, the "basket" was reduced to five currencies: the U. S. dollar, the Deutsche mark, the Japanese yen, the French franc, and the British Pound sterling. The daily valuation of the SDR as determined by the IMF is published in financial newspapers including the *Wall Street Journal*.

11. SDRs have no competing use as a commodity as did gold. They are thus insulated from free market speculation and other problems which led to instability in the price of gold and its ultimate breakdown as an international unit of account.

12. As it is a weighted average of the values of several currencies, it would be expected that the SDR would be relatively stable in value; and this, in fact, has been the case. Moreover, as discussed below, this is especially so when compared to the wide fluctuation in the commodity price of gold.

13. The facts set forth in the prior paragraphs concerning the relative stability in value of SDRs as opposed to the wide fluctuations in value of gold are illustrated in several graphs annexed as Exhibits to this Affidavit. *Exhibit A* is a graph and article from *The New York Times* of January 30, 1981, page D-1, column 4, relating to the value of gold between November 1979 and January 1981, which I have independently reviewed and verified to be correct. I substantiated *The New York Times* data by reviewing the average monthly price of one ounce of fine gold in *International Financial Statistics* published by the IMF. While *The New York Times* graph indicates daily fluctuations, and while the data from *International Financial Statistics* lists monthly averages, I have compared

the information and in my opinion the graph in the *Times* is accurate.

14. *Exhibit A* demonstrates the extraordinary fluctuations in the value of gold between November 1979 and January 1981. Indeed, as this graph illustrates, during January 1981 alone, the price of gold fell from approximately \$600.00 per ounce on January 5, 1981 to \$493.75 per ounce on January 29, 1981, a fluctuation of 18 percent in the 24 day period. Previously, the price of gold fell from approximately \$850 per ounce in January 1980 to approximately \$490 per ounce in April of that year only to rise to about \$700 per ounce in September 1980.

15. *Exhibit B* hereto is a graph which I myself prepared on the basis of data contained in "Gold Prices Table From 1944 to 1977" by Timothy Green, published by the Gold Information Center, and from *International Financial Statistics*. This graph illustrates fluctuations in the average market price of gold from 1929, the year the Warsaw Convention came into effect, to 1980. As this graph demonstrates, the price of gold was virtually stable in value from 1929 to 1970. However, with the elimination of stabilization of the price of gold by the world monetary powers, the value of gold began to fluctuate substantially. By 1974, for example, while the official price of gold was \$42.22 per ounce, the commodity price had risen to \$200 per ounce.

16. I have also prepared a graph comparing the fluctuation in value of gold to the fluctuation in value of SDRs for the period November 1979 to date. This graph is annexed hereto as *Exhibit C*. It clearly demonstrates that SDRs have been relatively stable in value during this

period while gold has fluctuated significantly. The data upon which this graph is based was also taken from the *International Financial Statistics* and is annexed hereto in tabular form as *Exhibit D*.

17. In sum the fluctuations in the commodity price of gold are extreme. Thus, not only the SDR but virtually all national currencies, including the French franc, the Deutsche mark, and the Swiss franc are far more stable. Indeed, the stability of the SDR *vis-a-vis* the commodity price of gold is quite dramatic. During the period November 1979 to date, the value of SDRs was highest during July 1980 (\$624.83) and lowest in April 1981 (\$569.62) for a difference of 10 percent. During the same period, however, the gold fluctuations were over 7 times as great. Thus, gold fluctuated from \$391.99 in November 1979 to \$675.31 in January 1980, a fluctuation of 72 percent.

/s/ Clive D. Bull
Clive Douglas Bull

(Jurat dated July 27, 1981, omitted in printing)

EXHIBIT A—NEW YORK TIMES ARTICLE AND
GRAPH OF JANUARY 30, 1981 ANNEXED TO
AFFIDAVIT OF CLIVE DOUGLAS BULL

New York Times, January 30, 1981, p. D-1, col. 4

GOLD BELOW \$500 IN LONDON

By Youssef M. Ibrahim

Special to The New York Times

LONDON, Jan. 29—The price of gold fell as low as \$485 an ounce here today—its first move below \$500 in

more than nine months. In later New York trading, however, gold for February delivery rose \$8.80 on the Commodity Exchange Inc. to \$515.80 an ounce, and the Republic National Bank quoted it at \$513 an ounce, up \$8.

The decline in Europe came amid a general feeling among brokers that their clients are deserting gold. Apparently investors are attracted by high interest rates in the United States and are losing interest in gold as a hedge against uncertainty because global political tensions seem to be easing.

The rebound in New York was attributed to fresh fears of unrest in Poland, following a warning on the Polish state radio that the Government "will have to take the necessary decisions to assure the normal functioning of plants and enterprises in accordance with the best social interests" if the present wave of labor disputes continues.

Gold closed on the London bullion market today at \$493.75 an ounce, down almost \$31 for the day. Some dealers predicted the price would go as low as \$400 an ounce over the next few weeks. The dollar rose sharply in relation to other major currencies.

"Last year's events—the invasion of Afghanistan, the holding of the American hostages, the Iranian-Iraqi war and the rising price of oil—have so distorted the market that people were carried away," a major British gold dealer said in an interview. "The way gold went up was totally out of proportion. What we are beginning to see is a return toward a more rational price, one that is much closer to reality."

The new price is far lower than the \$720 an ounce reached last September when the war between Iraq and Iran began, with its threat to the world's supply of oil. The record price of gold was \$850 an ounce, reached in January 1980.

Economists in London argued today that the most important factor in moderating the price of gold was high interest rates in the United States. Money market funds, now a popular investment vehicle, are yielding above 17 percent.

"It's an indication that people want to put their money into money rather than some noninterest-bearing commodity," said Robert Perlman, chairman of the London-based Forex Research, a foreign-exchange consulting concern.

Recent political developments also have been reassuring to investors who in uncertain times might seek a hedge in gold ownership.

Easing of Anxiety Cited

"The continued anxiety over the hostage crisis was the one factor that was moderating the fall in gold prices for a while," commented one London gold analyst. "Now that this is over, the prices are falling."

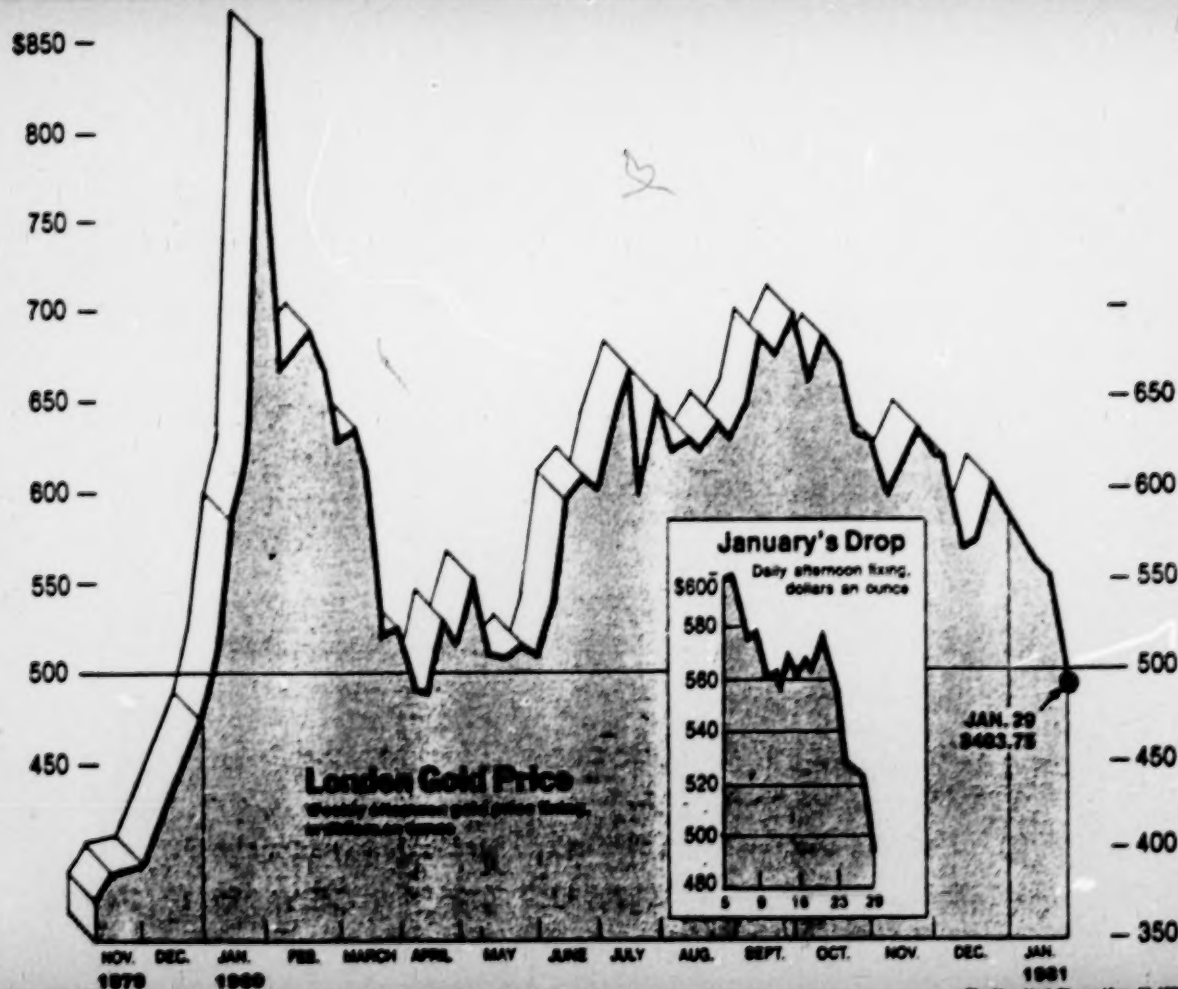
The price of gold has dropped more than \$70 an ounce since Jan. 20, when the American hostages, held in Iran for 444 days, were released and President Reagan was inaugurated.

Mr. Reagan's assumption of office, analysts in London say, has also given conservative investors an increased sense of confidence in the American economy. They cited

his pledges to trim the budget and follow a tight monetary policy.

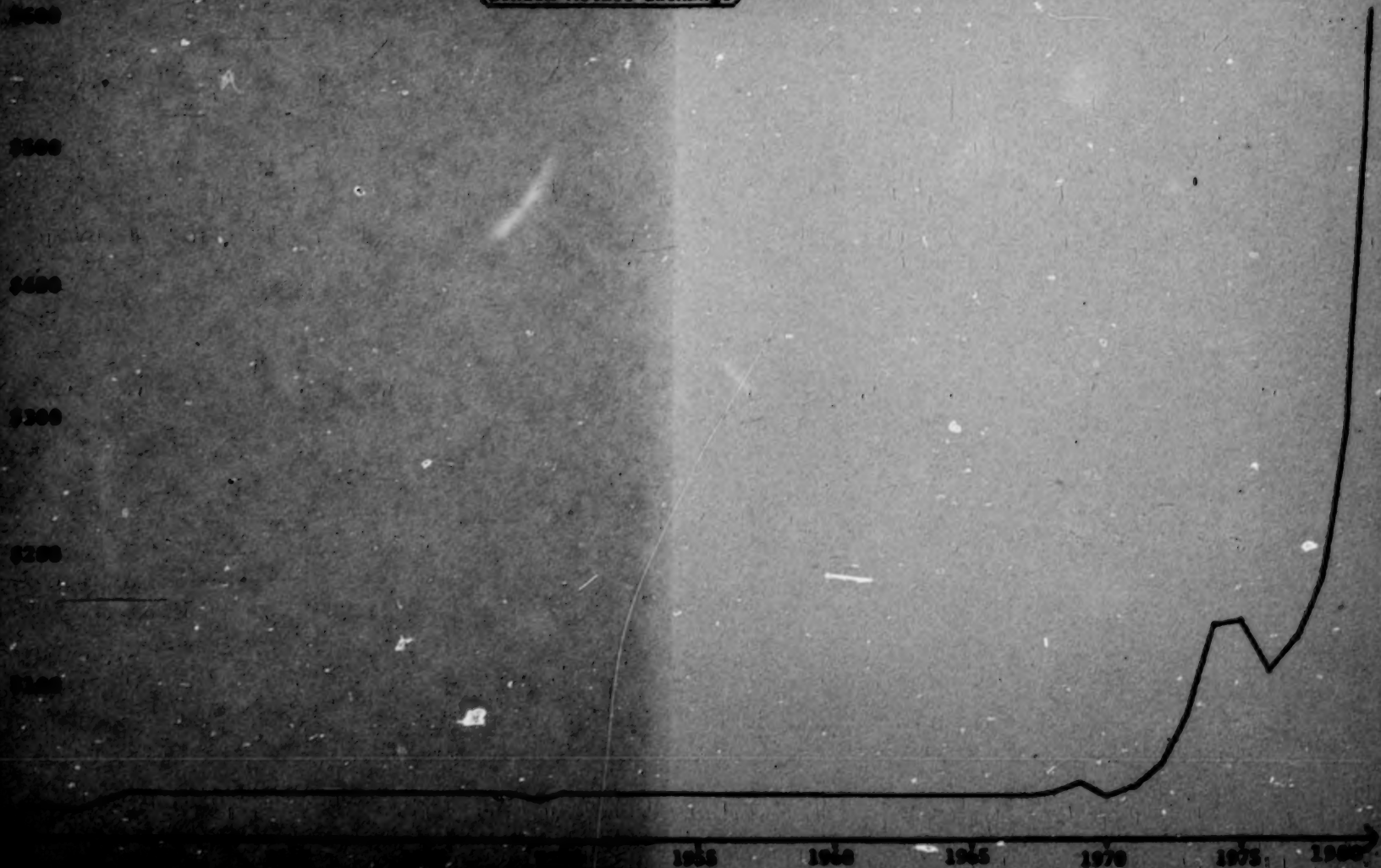
With the price of gold falling, one analyst suggested that producers of gold such as South Africa might step up their mining and increase their supply. This could help keep the price from rising again soon.

Part of the price decline has also been attributed to what a number of dealers said was a slowing of demand for gold in industrial use and in the manufacture of jewelry around the world. Demand has been discouraged by the worldwide recession and the recent high price of the metal.



JAN
EXHIBIT B—GRAPH ANNEXED TO AFFIDAVIT
OF CLIVE DOUGLAS BULL

Average Market Price per troy oz. of fine gold
(London Metals Exchange)



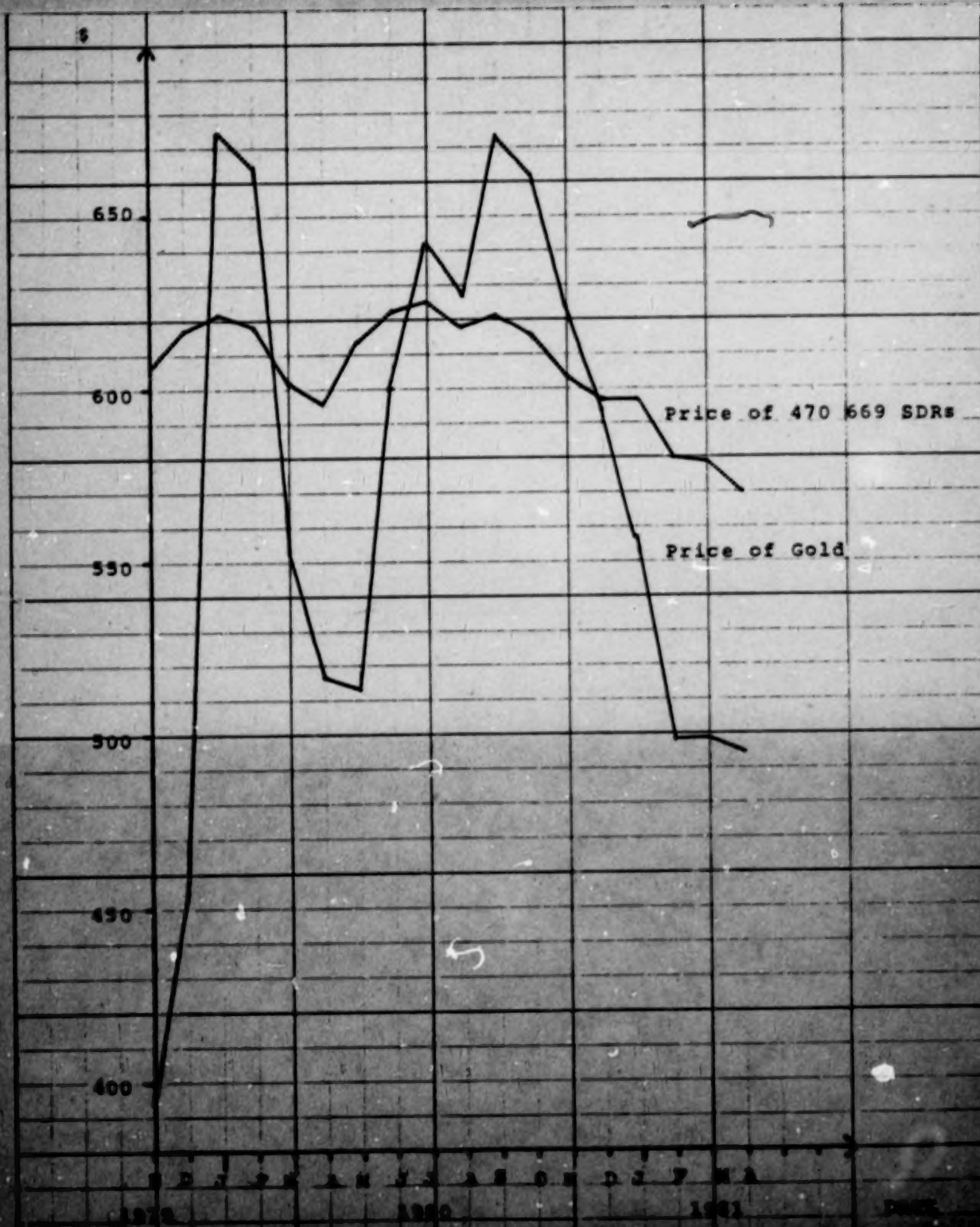


EXHIBIT D—TABLE ANNEXED TO AFFIDAVIT
OF CLIVE DOUGLAS BULL

Date	\$ price of 1 oz. fine gold ¹	\$ per SDR ¹	\$ Value of 470.699 ² SDRs
November 1979	391.99	1.29	608.98
December	455.08	1.31	617.57
January 1980	675.31	1.32	621.45
February	665.32	1.31	618.02
March	553.58	1.28	601.11
April	517.41	1.27	596.47
May	513.82	1.30	613.99
June	600.72	1.32	621.52
July	643.27	1.33	624.83
August	627.15	1.31	618.07
September	673.63	1.32	620.51
October	661.15	1.31	615.75
November	624.77	1.28	603.86
December	594.92	1.27	596.46
January 1981	557.39	1.27	596.77
February	499.76	1.23	579.98
March	498.76	1.23	578.14
April	495.80	1.21	569.62

Notes

1. All data from *International Financial Statistics*, I. M. F., various issues.
 2. 470.699 SDRs is the average 1980 \$ price of gold converted into SDRs at the 1980 average \$/SDR exchange rate.
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EXHIBIT B—C. A. B. STAFF MEMORANDUM OF
MAY 20, 1981 ANNEXED TO AFFIDAVIT
OF JOHN N. ROMANS

FOR INFORMATION

CIVIL AERONAUTICS BOARD

MEMORANDUM

May 20, 1981

TO: The Board

FROM: Director, Bureau of Compliance and Consumer Protection

CC: Director, Bureau of International Aviation
Director, Bureau of Domestic Aviation
General Counsel

SUBJECT: Warsaw Convention Liability Limits

For more than a year now, various components of the Board's staff have been considering the question of how the liability limitations contained in the Warsaw Convention should be converted to dollars. The question is a troublesome one, and the memoranda exchanged among the staff have not reached the same conclusions of this issue.¹ There is considerable interest in the final resolution of this matter among parties outside the Board, including some involved in litigation where the amount of potential liability is a significant issue.

The Board has never taken a position as to which liability limitation level is correct, and the Bureau of Compliance and Consumer Protection recommends that the Board decline to take any position which would affect the determination of liability limits until the matter has been fur-

¹ This Bureau wrote the first memorandum in March . . . 1980. BIA and BDA wrote reply memos in April . . . 1980.

ther refined at the staff level. Any policy recommendation that would come from the staff should be communicated to the Departments of Transportation and State as well in the hope of reaching interagency agreement. This memorandum contains BCCP's reappraisal of the problem and is intended to initiate a fresh start in addressing the question at the Board.

I. Background.

The Warsaw Convention was signed at Warsaw, Poland, on October 12, 1929, and ratified by the United States Senate on July 31, 1934.^{1a} Among its most compelling purposes were the protection of the fledgling aviation industry from potentially ruinous damage judgments and the assurance of some reliable and consistent basis for recovery for injury or damage to persons or property.² Thus the Convention (a) enunciated carriers' liability for personal injuries (Article 17), damage or loss of baggage and other property (Article 18), and damage due to delay (Article 19) subject to affirmative defenses which could be proved by a carrier, i. e., the carrier's freedom from fault (Article 20) or the injured person's contributory fault (Article 21); (b) provided a limitation on the extent of liability (Article 22); and (c) nullified any provision tending to relieve a carrier of any such liability or to fix a lower limit (Article 23). In addition, the Convention required carriers to provide notice to

^{1a} 49 Stat. 3000.

² Lowenfeld and Mendelsohn, *The United States and the Warsaw Convention*, 80 Harv. L. Rev. 497, 498-500 (1967). See also Horner & Legrez, *Minutes, Second International Conference on Private Aeronautical Law, Warsaw 1929* (Fred B. Rothman & Co. 1975), pp. 38, 40-41.

the passengers in the form of a ticket or baggage check with respect to, *inter alia*, the limitations on liability, and barred defenses permitted by the Convention, including the limitation of liability, if carriers accept passengers or baggage without delivering the required ticket or baggage check (Articles 3 and 4).

The Board has implemented Articles 3 and 4 by specifying the notice carriers must provide concerning the liability limits. 14 C. F. R. Sections 221.175 and 221.176. Carriers also include the liability limits in tariffs filed with the Board, as required by Section 403(a) of the Act and Part 221.3 of the Board's Regulations. The Board has also been an active participant in Congressional hearings concerning possible amendments to the Convention.

In March, 1980, our former Policy Development Division sent the Board a memo suggesting that carriers are violating the Warsaw Convention by asserting liability limits much lower than those actually permitted by the Convention. These limitations are expressed in terms of gold and have always been converted to dollars by use of the official rate of gold. Since there no longer is an "official" price for gold in the U. S., the memorandum suggested that the market value of gold has to be used in converting the liability limits to dollars.

BIA and BDA have written memos responding to this suggestion. Each response posed two major objections, i. e., (1) that the recommendation is inconsistent with the intention of the Warsaw signatories and (2) that it is inconsistent with IMF amendments establishing "Special Drawing Rights" tied to a basket of 16 currencies, rather than gold, as the basic unit of account for converting cur-

rencies. The Board has not taken any action on the recommendation.

II. Discussion

In 1929, when the Warsaw Convention was adopted, currencies were either expressed in gold or easily convertible to gold using an official rate. From 1933 to 1974, gold ownership in the United States was legal only for a small class of uses, such as jewelry-making and dentistry. The price of gold in these transactions was dictated by the government's official price, since it was the government's policy to buy and sell gold at that rate. A private buyer would thus not pay more than the official rate because he could buy it from the government at that price and, conversely, a private seller would not accept less than the official rate because he could sell it to the government for that amount.

The drafters of the Warsaw Convention thus foresaw no ambiguity in their use of gold as the unit of account because at the time governments had an official rate of gold which was easily discernible and virtually identical to the market rate of gold, to the extent that a market rate existed at all. Seeing no ambiguity, they never addressed the question of whether the official or market rate should be used in converting the limits to national currencies. To determine how the limits should be converted now that there is no official rate, one must attempt to determine what is most consistent with the purpose of the limitation on liability.

The primary purpose of the liability limits in the Warsaw Convention is the protection of carriers from un-

foreseeable and unlimited liability. At the time of the Convention, it was feared that carriers would refuse to carry passengers and/or cargo unless they could measure the scope of risk they were assuming. The limits were thus intended to provide a measure of predictability for carriers so that they could operate free from the fear of unlimited liability.

The use of gold as the unit of account was intended "to avoid, as far as the limits are concerned, the effects of devaluations which would result from having the limits expressed in any local currency."³ The use of gold was thus seen as providing more stability than any national currency could, further promoting the predictability the limits were intended to provide. This was because national currencies were subject to devaluation by their country, whereas the value of gold was not subject to change as the result of a single country's unilateral action.

There can be no doubt that use of the official rate of gold produces results more consistent with these purposes than use of the market rate. The official rate of gold, at

³ H. Drion, *Limitations of Liabilities in International Air Law* 1954, p. 183. Other writers agree but add that the use of gold was also intended to assure that damages awarded by different countries would have a uniform value and to provide stability in terms of the purchasing power represented by the limits. Bristow, "Gold Franc—Replacement of Unit of Account," LMCLQ 31 (1978), Asser, "Golden Limitations of Liability in International Transport Conventions and the Currency Crisis," 5 J. Maritime L. and Com. 645 (1973-74), Norway, "Conversion from Poincare Franc to National Currency," Presented to the 1974 meeting of ICAO's Legal Committee, and Tobolewski, "The Special Drawing Right in Liability Conventions: an Acceptable Solution?" 2 LMCLQ 169, 171 (1979).

least in the United States, fluctuated only rarely. Even in countries whose currencies were devalued more frequently, the official rate would provide greater predictability and stability than the market rate. This is especially true now, since speculation has led to wildly fluctuating market prices of gold.

Use of an official rate is supported by the approach adopted in more recent Conventions, when the ambiguity of expressing limits in terms of gold was more apparent. Both the Convention Concerning Liability for Oil Pollution, signed in Brussels in 1969, and the Convention Relating to the Limitation of the Liability of the Owners of Inland Navigation Vessels, signed in Geneva in 1973, expressly provided for the use of the official value of gold in setting liability limits.⁴ Conversion by the official rate is further bolstered by the fact that a majority of courts have used it in converting Warsaw's limits after the official and market rates began to diverge.⁵ ICAO also passed a resolution in 1974 opposing the use of the market price of gold in converting Warsaw's limits, which provides a strong indication of how other participating countries feel.⁶

Since it appears that stable limits were of paramount importance to the drafters of the Convention, basing them on the market value of gold would be inconsistent with the

⁴ The Legal Committee of ICAO, *Resolution Concerning the Conversion of Poincare Francs to National Currencies in the Warsaw and Rome Conventions*, 1974.

⁵ Tobolewski, "The Special Drawing Right in Liability Conventions: An Acceptable Solution?" 2 LMCLQ 169, 171 (1979).

⁶ See footnote 4.

Convention. Since there is no longer an official rate of gold in the United States, however, it is not entirely clear how the limits should be converted.

In 1975, the Warsaw signatories attempted to deal with the changes in the role of gold in international monetary transactions. Their answer, embodied in the Montreal Protocol, was the substitution of Special Drawing Rights (SDR's) for gold as the basis for conversion. The SDR is a creation of the International Monetary Fund (IMF), the agency which establishes the basic ground rules for currency transactions between member countries. Use of SDR's by the Montreal signatories was presumably intended to eliminate the confusion over how the Warsaw limits should be converted from gold to national currencies. With no official rate of gold and a fluctuating market rate which would produce results at odds with the Convention's purposes, the Montreal signatories chose to abandon gold in favor of SDR's because SDR's provided the stability and ease of conversion which had attracted the Warsaw signatories to choose gold as the unit of account.

The United States supported the SDR approach at Montreal and signed the Montreal Protocol.⁷ If the Senate had ratified the Protocol, the SDR approach would be law and there would be no problem in determining Warsaw's limits. The Senate has not ratified the Protocol, however, although it was submitted for ratification in January 1977. Its failure to either ratify or reject the Protocol makes determination of the proper conversion rate

⁷ Fitzgerald, "The Four Montreal Protocols to Amend the Warsaw Convention Regime Governing International Carriage by Air," 42 J. Air L. & Comm. 273, 325, 329-30 (1976).

difficult because (1) as explained above, use of the market rate of gold produces results inconsistent with the Convention's purposes, (2) there is no current official rate of gold and (3) the United States is obligated by international law to refrain from acts which would defeat the object and purpose of the Montreal Protocol.⁸

To fulfill its obligation to observe, to the extent possible, the requirements of both the Warsaw Convention and Montreal Protocol, the Board has for the past five years been engaging in a legal fiction. Unable to use the SDR approach because Montreal has not been ratified and constrained from using the market price of gold because doing so would defeat the object and purpose of both Montreal and Warsaw, the Board has continued to convert Warsaw's limits based on the official rate of gold immediately preceding the elimination of all ties between gold and the dollar.⁹ This approach produces the greatest degree of stability possible since the dollar limits will remain constant unless and until the United States reestablishes ties between gold and the dollar.

We believe that the Board's current course of action is superior to any of the alternatives currently available. Use of the last official rate of gold, however, may at times prevent passengers from recovering the full extent of

⁸ Article 18, Vienna Convention on the Law of Treaties, requires a country to refrain from acts which would defeat the purpose and object of a treaty it has signed until it makes clear its intention not to become a party. This obligation applies even when the treaty was signed subject to ratification and has not yet been ratified.

⁹ Thus, the notice of Warsaw's limits required by Parts 221.175 and 221.176 of the Board's Regulations is based on conversion at this rate.

damages caused by carriers.¹⁰ Carriers may no longer need the protection of these low limits, given the maturation of the aviation industry since 1929.

Because of the confusion inherent in converting Warsaw's limits when there is no official rate of gold and the equitable considerations raised by the low limits currently in force, we believe the Board should develop a coherent policy resolution of the questions, and then meet with the Departments of Transportation and State to review this problem. These agencies will be solely responsible for enforcing Warsaw in the future and have participated actively in formulating U.S. policy in this area in the past. Pending resolution of this issue by the three agencies we believe the Board should take no action which would disturb the conversion formula now contained in sections 221.175 and 221.176 of the regulations.

/s/ John Golden

Prepared by:

Steven Rothenberg
Ext. 3-5943

¹⁰ The limits are \$9.07 per pound for checked luggage, \$400 for carry-on bags and approximately \$10,000 per passenger. The \$10,000 limit is superseded, however, by a \$75,000 limit adopted by carriers in 1966.

JA42

EXHIBIT C—C.A.B. STAFF MEMORANDUM OF
MARCH 18, 1980 ANNEXED TO AFFIDAVIT
OF JOHN N. ROMANS

FOR INFORMATION

CIVIL AERONAUTICS BOARD

March 18, 1980

Approved:

/s/ [Illegible] B. Robertson
Director, BCP

TO: The Board

FROM: Chief, Policy Development Division, BCP

SUBJECT: Warsaw Convention Liability Limits

Article 22 of the Warsaw Convention sets forth the lowest ceilings that airlines may impose on their liability for death or injury to passengers or for baggage loss, damage, or delay in international travel. For reasons explained in this memo, we believe that carriers are asserting limits much lower than those actually permitted by the Convention.

INTRODUCTION

The Warsaw Convention liability limits are expressed in terms of French francs consisting of 65 $\frac{1}{2}$ milligrams of gold at a standard of fineness of nine hundred thousandths.¹ Article 22 of the Convention provides that, unless the airline and the passenger agree to higher liability, the limits are as follows:

¹ This refers to a particular French gold coin, the Poincare Franc, that was minted by the French government between 1929 and 1936.

1. 125,000 francs for each passenger;
2. 250 francs per kilogram for checked baggage and goods; and
3. 5,000 francs per passenger for unchecked baggage.

Article 22 further provides that these sums may be converted into any national currency in round figures. Finally, Article 23 renders null and void any contract provision tending to relieve a carrier of liability or to fix a lower limit than that stated in the Convention.

These limits, converted into dollar values, appear in currently effective tariffs on file with the Board, as well as Board-prescribed notices posted at airline ticket counters and included on standard airline ticket forms. Baggage liability limits are now stated at \$20 per kilo (or \$9.07 per pound) for checked luggage and \$400 for carry-on bags. The liability limit for injury or death is stated at approximately \$10,000 per passenger. This \$10,000 limit, however, no longer applies to passengers involved in travel to, from, or with a stop in the United States. By the Montreal Agreement, which went into effect on May 16, 1966, the carriers bound themselves to a \$75,000 liability limit² for death or personal injury to passengers.³ The order approving this agreement remains in effect today.⁴

² In case of a claim brought in a state that makes separate awards for legal fees and litigation expenses, the limit is \$58,000 exclusive of such legal fees and costs.

³ At that time, the 125,000 francs were converted to \$8,291.88. In November of 1965, the United States gave notice of denunciation of the Convention because of the low limits it placed on liability for death and personal injury. Subsequently, IATA efforts to effect an agreement among the vast majority of international carriers to voluntarily raise the limits provided a basis for the United States to withdraw its notice of denunciation.

⁴ Order E-23680, Docket 17325, dated May 13, 1966 approving Agreement CAB 18900.

THE GOLD FRANC TO U. S. DOLLAR CONVERSION MECHANISM

In converting the Warsaw limits to dollars, the carriers and the Board have always considered (1) the gold content of the Poincare franc, and (2) the "official" price of gold—the par value of the dollar refined in terms of gold for international currency transactions. Over the past ten years, however, actions of the U. S. Congress and the International Monetary Fund ("IMF") have eliminated the role that gold plays in these transactions, as well as the official price of gold on which the Warsaw calculations are based.

The IMF is the agency that established the basic ground rules for currency transactions between member countries, which include the United States and most of our trading partners.⁵ This organization is responsible for working out various problems that arise in establishing the relative values of different currencies. Under the original Articles of Agreement of the IMF, each member country was obliged to establish a par value for its currency, expressed in terms of gold or the U. S. dollar (the value of which was expressed in terms of gold) for the official settlement of international currency transactions.⁶ Pursuant to this requirement, the United States established a par value of the dollar as \$35 per fine troy ounce of gold. In 1972 and again in 1974, Congress passed legis-

⁵ The Bretton Woods Agreements Act (59 Stat. 512, 22 U. S. C. 286), which became effective on December 27, 1945, provides for United States participation in the IMF.

⁶ Articles of Agreement of the IMF, July 22, 1944, Article IV, Section 1(a).

lation that changed the par value of the dollar. In each case, the Board ordered corresponding adjustments to carrier tariffs, raising the liability limits to convert the limits of the Convention, expressed in terms of gold, to U. S. dollars.

The first order followed the passage of the Par Value Modification Act,⁷ which became effective on May 8, 1972, and directed the Secretary of the Treasury to establish a new par value for the dollar of approximately \$38 per ounce of gold. By Order 72-6-7, adopted June 2, 1972, the Board directed the carriers to revise their tariffs to reflect the new par value.

Public Law 93-110 (87 Stat. 352), which became effective in September of 1973, amended the Par Value Modification Act, further devaluing the dollar from \$38 to \$42.22 per ounce of gold. On January 3, 1974, the Board issued Order 74-1-16, which effected a corresponding increase in the international baggage liability limits to their present levels of \$20 per kilo or \$9.07 per pound.

Since its inception in 1945, the IMF has amended its Articles of Agreement twice in order to reflect the changing roles of gold and the dollar. The first amendment, which became effective on July 28, 1969, established the special drawing right ("SDR") to replace the dollar as the Fund's basic unit of account and set the value of the SDR at .888671 gram of fine gold.⁸ On April 30, 1976, the IMF's

⁷ Public Law 92-268 (86 Stat. 116). Section 2 of the Par Value Modification Act established the new par value of the dollar at one thirty-eighth of a fine troy ounce of gold.

⁸ Amendment of the Articles of Agreement, dated April, 1968; Article XXI, Section 2.

Board of Governors approved a second amendment to its Articles which (1) eliminated the obligation of member countries to use gold as a denominator in currency transactions, and (2) eliminated gold as the means of setting the value of the SDR, substituting a formula using a so-called "basket" of 16 currencies of major countries that are members of the IMF.

On October 19, 1976, with the enactment of Public Law 94-564, the United States ratified this amendment and repealed Section 2 of the Par Value Modification Act, thereby eliminating the ties between gold and the dollar, as well as the official price of gold. These changes became effective upon entry into force of the second amendment to the IMF Articles of Agreement on April 1, 1978. Although this action completely abolished the official price of gold, the carriers' liability limits are still being converted to U.S. dollars using the \$42.22 per ounce figure. Changes in the applicable laws appear to have removed the legal basis for using this amount, however.

During the early 1970's, the carriers and many governmental aviation authorities foresaw the effects that the changing role of gold could have on the interpretation of provisions like Article 22. Since 1968, a two-tiered system for establishing gold prices had existed, which separated transactions conducted for official monetary purposes through central banks from other transactions such as free market sales of gold. Central banks used the official price, while the free market gold prices were determined by market forces. The gap between the official price and market price began to widen significantly in 1971. While the official price continued to be applied to conversions of gold to dollars for the purposes of Warsaw and other avi-

ation treaties, efforts were intensified to amend Warsaw. The Guatemala Protocol and the Montreal Protocols contain amendments to Article 22 changing the unit of reference from gold francs to SDR's. These protocols, however, have been ratified by very few countries, and none of them have been ratified by the U. S. Senate.

In October of 1974, the Legal Committee of the International Civil Aviation Organization ("ICAO") issued a paper explaining that if the market, rather than the official, price were used to convert gold francs to national currencies, the carriers' potential liability limits would increase abruptly. ICAO adopted a resolution stating that:

. . . [T]he conversion of the sums fixed in Poincare francs into national currencies other than gold should not be made on the basis of the price of gold on the free market for that metal.

ICAO resolutions may be legally binding when their purpose is to interpret or clarify international agreements. They cannot by themselves be used to amend or modify international treaties, however. The purpose of this resolution was to clarify Article 22 at a time when there were two prices of gold—an official price and a market price—from which to choose. The fact that gold no longer has an official price, however, makes reliance on this resolution unworkable since its application renders the currency clause of the Warsaw Convention impossible to apply without further amendment.

GOLD VALUES AND LIABILITY LIMITS

As long as the official price of gold existed and remained fairly constant, the Warsaw limitations remained close to the level considered adequate to cover passenger

claims filed with airlines back in the 1930's. The limits for death and personal injury increased with the approval of the Montreal Agreement. But baggage liability limits, which started out at \$7.62 per pound in 1934, have not risen appreciably since that time. Following the devaluation of the dollar in 1972, they went up to \$8.15 per pound, and in 1974 they increased to the present level of \$9.07 per pound. For a hypothetical 44-pound lost suitcase, the maximum amounts the carrier would have to pay a claimant were \$330, \$359, and \$400 respectively. During this period, however, the value of the dollar declined. In terms of purchasing power, three hundred thirty 1934 dollars were worth \$1,031 in 1972, \$1,215 in 1974 and \$1,920 in January, 1980.⁹

The liability limits increase dramatically if the calculations are based upon the market value of gold. The following chart illustrates what the liability limits would be at various selling prices of the metal:¹⁰

Price of gold per troy ounce	Liability for death or injury	Liability per pound for checked bags	Liability for carry- on baggage or for 44-lbs of checked luggage
\$42.22	\$ 10,000.00	\$ 9.07	\$ 400.00
\$200	\$ 47,382.86	\$ 42.97	\$1,895.31
\$300	\$ 71,074.29	\$ 64.46	\$2,842.97
\$400	\$ 94,765.71	\$ 85.94	\$3,790.63

⁹ Consumer Price Index, all urban consumers, United States city average for all items.

¹⁰ These figures are based only on the value of gold in the coins. They do not take into account the numismatic value of the Poincare franc, which is now a rare collector's item that sells for many times the value of the metal itself.

\$500	\$118,457.14	\$107.43	\$4,738.29
\$600	\$142,148.57	\$128.91	\$5,685.94
\$700	\$165,840.00	\$150.40	\$6,633.60
\$800	\$189,531.43	\$171.89	\$7,581.26
\$900	\$213,222.86	\$193.37	\$8,528.91
\$1000	\$236,914.29	\$214.86	\$9,476.57

While the figures for baggage liability limits based on the market value of gold are probably in excess of the value of most passengers' checked belongings, the limits on death and personal injury claims are lower than amounts received by many plaintiffs in wrongful death actions.

BACKGROUND OF THE WARSAW LIABILITY LIMITS

The Warsaw Convention was negotiated during the late 1920's when the aviation industry was in its infancy. The minutes of the negotiations show that the primary concerns of the drafters are no longer of great importance to the industry. In addition, their assumptions about how the liability limitation mechanism would work were erroneous.

In 1929, air travel was perceived by the public and, more importantly, by insurance companies to be an extremely risky mode of transportation. A major justification for limiting liability was that, unless carriers could present potential insurers with some degree of predictability in estimating damages from aircraft accidents, they would have great difficulty in obtaining coverage. Furthermore, the delegates had little sympathy for anyone foolish enough to board an airplane without enough personal insurance to provide for his widow (or her widower)

and children should the plane crash.¹¹ Over the years, air travel has become one of the safest modes of transportation, and airlines, even those operating under circumstances where they cannot limit their liability for death or personal injury, have no special difficulties finding insurers.

The minutes also reflect the delegates' rationale for using gold as the unit of reference in determining carrier liability limits, instead of pegging the limits to some particular currency like the dollar or the franc, with no reference to the metal. The main object of the gold clause was to avoid fluctuations in currency values and problems that might be caused by unilateral action by the government whose currency was used in the liability clause. The qualities of gold that appealed to Warsaw's drafters were its stability and its tendency to reflect real values better than currency.¹² But it didn't work that way. Until recently, we kept the "official" price of gold artificially low and restricted the ability of individuals to buy and sell gold on the market. Thus its price did not reflect the weakened purchasing power of the dollar or of other currencies resulting from worldwide inflation. Now that there are no restrictions on private ownership of gold, it is traded like any other commodity. With speculative buying, its value has soared, and gold has lost its stability as the result of its daily price fluctuations.

¹¹ Minutes of the Second International Conference of Private Aeronautical Law, Warsaw, 1929; translated by Robert C. Horner and Didier Legrez, pp. 48-49.

¹² *Ibid.*, pp. 88-91.

Warsaw has become an anachronism, yet various attempts to amend it have become stalled by the ratification process. While the Guatemala and Montreal Protocols would have revised the limits upward, the proposed limits were still relatively low, and none of the proposals contained a mechanism that would provide for periodical adjustments to compensate for inflation. Article 22 tied to gold, however, overcompensates for inflation to the point that the industry may view it as a sort of passengers' affirmative action plan that is supposed to make up for years of unreasonably low limits. Although gold-based limits may not be the most rational approach to allocating risks between carriers and consumers of international air transportation, the framers of Warsaw deliberately adopted this approach—expressly rejecting a dollar or some other currency-based system—and probably left us no flexibility as long as Warsaw remains in effect.

EFFECTS ON THE CARRIERS

Using the market value of gold would affect carriers' liability limits in two important ways. First, the limits would fluctuate on a daily basis, along with the price of gold. Second, at least for the foreseeable future, the new limits would be much higher than those now in effect. Inevitably, these factors will impose new costs on carriers.

Liability limits based on variable gold prices will create administrative burdens for carriers. They will have to keep track of market fluctuations on a daily basis, as they now keep close tabs on daily currency value changes. Airlines will also have to devise a new approach to providing notice to passengers of the amount of their limits

on liability for personal injury, death, or baggage claims. Additionally, variable gold prices may raise questions about which price of gold would be used in particular liability limit calculations—the value on the date the bag is lost or the accident occurs or the price of gold on the date the claim is paid? Because the price on a given day may vary from one gold market to the next, which market quotations will be applied to the settlement? These questions would not present a significant problem in the vast majority of baggage claims, since the maximum liability limits using the market price of gold will probably be high enough to cover most routine claims. For death or injury claims, or in instances where baggage claims approach or exceed the ceiling, the courts will have to decide which price prevails.

The applicability of higher liability limits will, of course, result in higher claim settlements and higher insurance premiums for carriers. The increase in insurance premiums, moreover, may be exacerbated by the fact that the liability limit fluctuates. Since the insurance companies may not be able to predict the average limits that will apply to claims against the policies, they may rely on high projected liability limits in setting their rates. All of these costs will be passed on to all air travelers in the prices of airline tickets.

In the case of baggage liability, carriers will have some control over the escalation of these costs. The actual costs to each airline will depend on the way it handles (or mishandles) suitcases and claims. As international markets become more competitive, carriers will have strong incentives to improve baggage handling, thus reducing

claim costs, rather than routinely settling claims and passing on the costs in higher fares.

CONCLUSIONS AND RECOMMENDATIONS

The Warsaw Convention is a multilateral treaty that has the force of law, and the United States and other signatories to the Convention are obliged to enforce its provisions within their territories as long as it remains in effect. Assuming that since April 1, 1978 there has been no legal basis for the use of the \$42.22 per ounce price of gold for converting the Article 22 liability limits to dollars, we recommend that the Board instruct the staff to do the following:

1. Draft an order instructing the carriers to revise their tariffs to reflect more accurately their liability ceilings under Warsaw. In our view, the carriers need not file U. S. dollar equivalents in their tariffs, but could instead file rules with the limits expressed in gold francs.

2. Evaluate the impact such an order would have on the Board's continued approval of the Montreal Agreement. Article 23 of Warsaw renders null and void any provision tending to fix a lower limit than that stated in the Convention. It would therefore appear that the \$75,000 limit for death or personal injury may be applied only in the event that the price of gold falls below \$320 an ounce, the approximate amount at which the Warsaw limit would equal the Montreal Agreement limit. This raises a possible legal issue: can the Board preserve the Montreal Agreement limit as a floor on carrier liability, even if that Agreement is null and void when the price of gold is higher than \$320 an ounce? In addition, the ticket no-

tice could mislead people when the Warsaw limit is higher than \$75,000 and therefore cause some injured passengers or their heirs to agree to smaller settlements than they would otherwise receive. The question arises, however, whether the Board can disturb the Montreal Agreement by withdrawing its approval of the notice provisions without threatening the continued applicability of the \$75,000 as a floor on the carriers' liability limits.

Board action to change the method of converting gold francs to dollars will have a strong impact on both U. S. and foreign airlines. We therefore suggest that any order which the staff drafts be coordinated with the Departments of State and Transportation before it is sent to the Board for adoption.

/s/ Patricia Kennedy

EXHIBIT D—C.A.B. ORDER 74-1-16 ANNEXED
TO AFFIDAVIT OF JOHN N. ROMANS

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
WASHINGTON, D. C.

Docket 26274

Adopted by the Civil Aeronautics Board
at its office in Washington, D. C.
on the 3rd day of January, 1974
IN THE MATTER OF WARSAW CONVENTION LIABILITY
LIMITATIONS AS EXPRESSED IN U. S. DOLLARS

ORDER

Section 221.38(j) of the Board's Regulations requires U. S. and foreign air carriers which avail themselves of the limits of liability to passengers provided in the Warsaw Convention (49 Stat. 3000; T. S. 876) to include in their tariffs, *inter alia*, a statement as to the amount of the liability limits of the Convention stated in dollars. These provisions of the tariffs, as well as those setting forth limitations of liability under the Convention with respect to baggage and property, restate the applicable law and serve to advise the public of the Convention limitations on their right of recovery for death, or injury or loss or damage to baggage and property.

The liability limits in the Warsaw Convention are set forth in terms of gold francs so that as long as the value of the dollar in terms of gold remained constant, no change was required in the dollar amount of the liability limits contained in the tariffs. However, by Order 72-6-7 adopted June 2, 1972, the Board directed the carriers to revise their tariffs to reflect the devaluation of the dollar in terms of gold from \$35 per ounce to approximately \$38 which took place effective May 8, 1972, and such revisions have been made. On September 21, 1973, Public Law 93-110 was enacted, further devaluating the U. S. dollar to approximately \$42.22 per ounce of gold effective October 18, 1972. As a result, the minimum liability limits specified in Order 72-6-7 and the tariffs currently on file with the Board no longer meet the minimum liability limits of the

Convention and a revision of the tariffs is necessary to accurately reflect such limits in dollars.¹

In view of the foregoing and of all other relevant matters, the Board finds and concludes:

1. That the dollar limitations stated in the presently effective tariffs of the respondent air carriers and foreign air carriers no longer meet the minimum liability requirements of the Warsaw Convention for "international transportation" or of the Hague Protocol² and "international carriage" as defined therein.

2. That, in this circumstance, such tariff limitations are inconsistent with the applicable law as set forth in the Convention or the Protocol, and the tariff filing requirements in Section 403 of the Federal Aviation Act of 1958, and Part 221 of the Board's Regulations and they must be canceled.

3. That the minimum acceptable figures in United States dollars for liability limits applicable to "international transportation" and "international carriage" are as follows:

¹ With respect to their liability to passengers, this order will affect only a small proportion of the U. S. and foreign air carriers. Most carriers engaged in international transportation by air involving journeys to or from the United States adhere to the Montreal Agreement (Agreement CAB 18900 approved by Order E-23680 dated May 13, 1966, 31 F. R. 7302) pursuant to which they have filed tariffs providing for a \$75,000 limit of liability for death or injury to passengers. Since this limit is stated in terms of U. S. dollars, it is unaffected by the change in the gold value of the dollar.

² The Hague Protocol of 1955 doubles the Warsaw liability limit for passengers, but since the United States has not signed or adhered to the Protocol, its provisions do not normally apply with respect to air transportation.

Convention and Protocol Minimum Liability	Actual	Rounded ³
125,000 francs (per passenger, Convention only)	\$10,002.90	\$10,000.00
250,000 francs (per passenger, Hague Protocol only)	20,005.80	20,000.00
5,000 francs (per passenger for unchecked baggage)	400.116	400.00
250 francs (per kilogram for checked baggage and goods)	20.00580	20.00
250 francs (per kilogram on a per-pound basis)	9.07460	9.07

Accordingly, pursuant to the provisions of the Federal Aviation Act of 1958, particularly Sections 204(a), 403, and 1002 thereof,

IT IS ORDERED THAT:

1. The carriers named in Appendix A, attached hereto, shall revise all liability limitations which may be applicable to "international transportation" or "international carriage" as defined in the Convention or the Protocol which are inconsistent with the dollar amounts set forth herein so as to conform with such amounts.

2. The tariff cancellations directed in ordering paragraph 1 above shall become effective on or before February 6, 1974, on not less than 10 days' notice.

3. That copies of this order shall be served on the air carriers and foreign air carriers named in Appendix A.

This order will be published in the Federal Register.

By the Civil Aeronautics Board:

(SEAL)

EDWIN Z. HOLLAND, *Secretary*

³ Article 22 of the Warsaw Convention permits the liability limits specified therein in gold francs to be converted into any national currency in round figures. The Board is permitting the round dollar amounts set forth in this order to be filed in the tariffs for purpose of convenience. This order is not intended to prohibit carriers from specifying the actual dollar equivalents in their tariffs as some of them do at the present time. The dollar values herein are calculated in accordance with the criteria detailed in Order 72-6-7.

EXHIBIT E—ICAO LEGAL COMMITTEE
RESOLUTION ANNEXED TO AFFIDAVIT
OF JOHN N. ROMANS

RESOLUTION
CONCERNING THE CONVERSION OF POINCARÉ FRANKS TO
NATIONAL CURRENCIES IN THE WARSAW AND ROME CONVENTIONS

The Legal Committee of ICAO

Considering that the limits of liability fixed by the Convention for the Unification of Certain Rules relating to International Carriage by Air Signed at Warsaw on 12 October 1929 and those determined by the Protocol of the Hague of 28 September 1955 and the Protocol of Guatemala City of 8 March 1971 are expressed in "francs consisting of 65.1/2 milligrammes of gold millesimal fineness 900", commonly called the Poincaré franc;

Considering that the limits of liability fixed by the Convention on Damage caused by Foreign Aircraft to Third Parties on the Surface signed at Rome on 7 October 1952 are likewise expressed in Poincaré francs;

Considering that under these Conventions the conversion of these sums "into national currencies other than gold shall, in case of judicial proceedings, be made according to the gold value of such currencies at the date of the judgment";

Considering that since 1968 the price of gold on the free market for that precious metal no longer necessarily corresponds to its price calculated on the basis of the official rates;

Considering that the price of gold on the free markets existing in certain countries is subject to significant variations at different times and in different places;

Considering that the official value of currency is used in several Conventions recently entered into or in course of preparation under the aegis of the United Nations and in particular in the Convention Concerning Liability for Oil Pollution, signed at Brussels on 29 November 1969 and in the Convention relating to the Limitation of the Liability of the Owners of Inland Navigation Vessels, signed at Geneva on 1st March 1973;

Considering that at the time of the negotiation of the Warsaw Convention, the Rome Convention and the Hague Protocol the market for gold had a character profoundly different from that which it has today; and that the authors of the Guatemala City Protocol intended to fix a limit of liability corresponding approximately to 100,000 United States dollars;

For the aforesaid reasons, is of the opinion that for the application of the Air Law Conventions and Protocols mentioned above, and in particular the Guatemala City Protocol, the conversion of the sums fixed in Poincare francs into national currencies other than gold should not be made on the basis of the price of gold on the free market for that metal.

JA60

EXHIBIT F—C.A.B. STAFF MEMORANDUM OF
APRIL 18, 1980, ANNEXED TO AFFIDAVIT
OF JOHN N. ROMANS

CIVIL AERONAUTICS BOARD

April 18, 1980

MEMORANDUM

TO: Assistant Director for Proceedings, BIA
FROM: Jeffrey Gaynes, Attorney, Legal Division, BIA
Subject: Attached BCP Memo on Warsaw liability
limits

BACKGROUND

BCP recommends that the Board consider steps that would change the basis of gold-to-currency conversion for the Warsaw Convention provisions on limiting liability from the official rate for gold to the free market rate, thereby substantially raising the liability limits.

PROBLEM POSED

What would be the legal validity and the ramifications of the BCP proposal?

CONCLUSION

From a strictly legal standpoint, the BCP proposal raises serious questions, but plausible arguments are available to answer at least some of those questions. From a policy standpoint, the BCP proposal holds the potential of causing severe international repercussions, at least as severe as those engendered by the Board's IATA show cause order. It conceivably could cause the breakdown of the whole Warsaw system.

DISCUSSION

I. *Legality of a shift to the free market rate*

BCP has accurately set forth the facts regarding the demise of the post war international monetary system. Writers both pro and con on the validity of shifting to a free market conversion rate concede that the official rate no longer exists.¹ They also agree that neither the text nor the preparatory work of the Warsaw Convention specify clearly which rate—official or free market—the drafters intended to be used. Indeed, the conclusion seems quite certain that the drafters never even considered the problem, since at the time of the Convention's adoption, the two rates scarcely diverged.

The problem thus becomes one of seeking to discern what the drafters would have intended had they thought of the potential ambiguity they were creating. One school of thought says that the chief intent in the liability limitation gold clauses was "to provide a measure of stability in an environment of fluctuating exchange rates and some certainty that the real value of the limitation amount shall be equal regardless of the currency of payment or the time of conversion."² Given these key goals—stability, certainty, and uniformity—use of the free market rate,

¹ Pro: Heller, *The Value of the Gold Franc—A Different Point of View*, 6 J. Maritime L. & Com. 73 (1974-75); Con: Asser, *Golden Limitations of Liability in International Transport Conventions and the Currency Crisis*, 5 J. Maritime L. & Com. 645 (1973-74).

² Asser, *supra* note 1 at 664. A leading Dutch court has supported this interpretation. *Hornline v. Societe Nationale des Petroles Aquitaine*, Decision of April 14, 1972 (N. J. 1972, 269).

according to this school, would run directly contrary to the object and purposes of the Warsaw Convention.

Another school says that the true rationale of the Warsaw gold clauses was "to maintain the purchasing power of the agreed quantities of gold and thus to avoid the effects of devaluation."³ On this theory, conversion at the free market rate would be in complete conformity with the Convention's objects and purposes since the free market rate provides a much better guard against inflation. Furthermore, so the argument continues, use of the free market rate would provide as much if not more uniformity as existed under use of the official rate.

As to which school has the better case, it is probably the former, though the latter (Heller) thesis certainly provides ample material for a strong brief arguing the opposite position.^{3a}

The biggest difficulty in the free market rate argument is the subsequent practice of the international community in the years following Warsaw, and especially once the two-tier gold market developed. When an official rate existed, it was always this rate that was used. In discussions producing the higher liability limits of the 1971 Guatemala Protocol, even though the debate was based on the *dollar* value of the new limits, those dollar values

³ Heller, *supra* note 1 at 92. See also H. Drion, *Limitation of Liabilities in International Air Law* 183 (1954).

^{3a} One point in favor of the free market approach is that at least some authors, prior to the current monetary instability, saw it as arguably permissible under Warsaw in cases where no official gold rate was applicable. See Drion, *supra* note 3 and Lacombe, *La Revision de la Convention de Varsovie*, 9 *Rev. Gen. De L'Air* 179 (1948).

were converted into gold *at the official rate* for expression in gold units in the text of the Protocol. As to the 1974 ICAO resolution, while this was not all that strongly supported (many countries abstained from the vote) and while, in practical terms, it constitutes a dead letter (the official rate no longer exists), it does carry symbolic weight, demonstrating that a significant portion of the international community felt that the official and not the free market rate was the proper one to be used.

All of the arguments made so far can be countered. Prior to the two-tier system, use of the official rate rather than the free market rate really proved nothing, since the two rates were virtually the same. Regarding the discussions at Guatemala, use of dollars rather than gold as the basis for debate demonstrates a recognition by the international community that differences existed within the community on the true place and meaning of gold. And, as was said, the ICAO resolution of 1974 received only moderate support and was approved when the official rate had, for all practical purposes, ceased to exist.⁴

Because of events in 1975, though, the case for the free market rate weakens considerably. The reason is the Montreal Protocol, with its substitution of Special Drawing Rights (SDR's) for gold as the basis for conversion. Changeover to SDR's represents a decision by the international community that the gold clauses were no longer adequate in light of the developments in the inter-

⁴ It is also possible that this resolution was never adopted by ICAO as a whole—as the memo implies—but rather only by ICAO's Legal Committee—as some of my research has led me to believe.

national monetary system. Presumably, this assessment was based in large part on the realization that the official rate for gold no longer existed. The scholarly debate in the Journals before Montreal had presented the SDR idea and the free market rate idea as alternative approaches. The delegates at Montreal chose SDR's.

One might be prompted to interject here, "Yes, but the U.S. has not ratified the Montreal Protocol, and the Protocol is not yet in force." True enough. But not determinative. The U.S. was actually a supporter of the SDR approach.⁵ The U.S. voted for the changeover to SDR's in the Montreal Protocols. A rule of customary international law embodied in the Vienna Convention on the Law of Treaties, Article 18, states that "a state is obliged to refrain from acts which would defeat the object and purpose of a treaty when: (a) it has signed the treaty . . . subject to ratification. . . ." The President submitted the Montreal Protocol to the Senate for ratification in January, 1977, and it is still pending. The Article 18 obligation endures until a signatory has made clear its intention not to become a party. The U.S. has yet to make such an intention clear. Unquestionably, for the U.S. to now adopt the free market gold conversion rate would severely undermine the object and purpose of the Montreal Protocol. Thus, the United States would be in violation of international law.

The U.S. could, of course, simply demonstrate clearly its intention not to ratify Montreal, e. g., if the Presi-

⁵ Fitz Gerald, *The Four Montreal Protocols to Amend the Warsaw Convention Regime Governing International Carriage by Air*, 42 J. AIR L. & COM. 273, 325, 329-30 (1976).

dent withdrew it from Senate consideration. This would arguably remove the Article 18 problem and restore the *status quo ante*, in other words, the Warsaw liability limits, gold conversion rate and all. Since no official gold rate exists, the U. S. could adopt the free market rate as the only one practicable. On this, it could argue along the lines set forth by Heller, that it was conforming to the Convention and thereby not violating international law. The move might carry great legal/political ramifications, however, as will be discussed next.

II. *The Legal and Political Fallout From a shift to the Free market rate*

While use of the free market rate might be legally defensible, it is sure to provide a response from other parties to the Warsaw Convention. Some countries might adopt the Asser line of reasoning (see text accompanying footnote 2 *supra*) and accuse the U.S. of violating the treaty and therefore international law. More likely, however, it is a breakdown in the Warsaw system. A rarely used but nevertheless generally accepted rule of international law allows parties to suspend or terminate their treaty obligations when circumstances forming an essential basis of their consent to the treaty undergo a "fundamental change." This fundamental change of circumstances concept⁶ is akin to the frustration of performance concept in American contract law. The disappearance of the official rate for gold and the fantastic inflation of the free market rate together constitute a fundamental

⁶ The concept is sometimes referred to by the Latin terms "clausula rebus sic stantibus."

change of circumstances from the conditions on which consent to Warsaw was based in the late 1920's and early 1930's.⁷ Yet, because of the various protocols attempting to adapt Warsaw to the change and because of the continuing adherence to fictional official rates, no state has yet invoked the "fundamental change" doctrine. Were the U. S. to espouse the free market conversion rate, the issue would finally be forced, and the Warsaw Convention then might be so widely denounced or avoided as to become meaningless. According to Peter Schwarzkopf, an end to the Warsaw regime might be a valid policy option, but if this in fact is what the U. S. wants, it should do so forthrightly through denunciation, instead of relying upon the "back door" approach represented by adoption of the free market conversion rate.

Schwarzkopf also anticipates that the BCP proposal would prompt considerable antagonism abroad, producing difficulties in American bilateral aviation relations comparable to those produced by the IATA Show Cause Order. In Schwarzkopf's words, "foreign governments are going to scream." Again, this does not bring him necessarily to reject the proposal; however, he does say that if we approve the proposal, we have got to be prepared for the consequences.

III. *The 1966 Montreal Agreement*

I have not concentrated on this aspect of the BCP proposal because, in light of the anticipated effects of the free market rate proposal, I am not sure that the Montreal Agreement issue will arise. My feeling is that

⁷ Asser, *supra* note 1 at 669.

the negative international reaction to the free market gold idea will produce a similarly negative reaction to the idea of transforming the \$75,000 liability ceiling into what would be either a liability floor—or a nullity—as the circumstances (and the Board) might decide. The proposal conveys the impression of an American desire to both have one's cake and eat it, i. e., to use Warsaw when convenient and ignore it when not.

Jeffrey Gaynes
B-57, Ext. 35035

EXHIBIT G—SWEDISH STATUTE ANNEXED
TO AFFIDAVIT OF JOHN N. ROMANS

TRANSLATION FROM SWEDISH

Swedish Collection of Statutes

Law
concerning changes in the Carrier
by Air Act (1957:297)
promulgated on March 30, 1978.

SFS 1978.132
Printed
on April 13, 1978

According to a Parliamentary resolution¹ it was directed that Chapter 9, § 22 of the Carrier by Air Act (1957:297) be amended to read as follows:

¹ Bill 1977/78 70, LU II, rskr 145.

Chapter 9

§ 22² When transporting passengers the carrier's liability for any one of them is limited to sixteen thousand six hundred special drawing rights and even if the compensation is paid out in the form of an annuity the capitalized value thereof may not exceed said limitation. If the carrier is a Swedish corporation, the liability shall, however, be limited to two hundred seventy thousand Swedish crowns. The carrier shall undertake on the ticket or in its general terms and conditions of passage to adhere to this limitation of liability. In the event the carriage is only partially carried out by a Swedish carrier, what was stated above about the higher limitation of liability and about the obligation to undertake to adhere to this amount shall apply only to such portion of the passage as is carried out by such carrier. A higher liability than stated in this section may be agreed to contractually.

As to checked baggage or freight, the carrier's liability shall be limited to seventeen special drawing rights per kilo. If the passenger or the person sending the freight has upon delivery of the baggage or the freight specially indicated the value of the baggage or the freight and paid the applicable additional charge therefor, the value so specifically stated shall constitute the limitation of the liability of the carrier unless the carrier shall have determined that the actual value of the baggage or freight is lower. If registered baggage or freight is partly lost, diminished, damaged or delayed, or if part of its contents is lost, diminished, damaged or delayed, only the total weight of the item or items in question will be taken into consideration when the limitation of the carrier's liability

² Latest version 1976:II.

is determined, provided, however, that if the loss, diminution, damage or delay affects the value of the other items included in the same proof of passage or airway bill, the aggregate weight of all these items shall also be taken into consideration.

As to objects kept under the control of the passenger, the liability is limited to three hundred thirty-two special drawing rights for each passenger.

The carrier shall pay any legal fees in addition to the limitations of liability stated in this section which might be exceeded thereby. The foregoing shall not apply when within six months of the event causing the damage or before any legal action is initiated the carrier has offered the damaged party in writing compensation which is not less than what is awarded by judgment, legal fees not included.

The term "special drawing rights" means for purposes of this statute the special drawing rights used by the International Monetary Fund. In the event of a claim for compensation such special drawing funds shall be converted into Swedish currency at the rate in effect on the day judgment is rendered. The value of the Swedish crown shall be determined in accordance with the method of computation which the International Monetary Fund uses the same day for its activities and transactions.

This statute shall become effective two weeks after the day when the text thereof shall have been printed in the Swedish collection of statutes.

On behalf of the Government

SVEN ROMANUS

Bengt G. Nilsson
(Department of Justice)

JA70

CERTIFICATION

I, Irwin K. Styles, of ALL-LANGUAGE SERVICES, INC., 545 Fifth Avenue, New York, New York 10017, hereby certify that the foregoing is a true and faithful translation of the original document.

/s/ Jesuit J. Tyler

(Jurat dated July 28, 1981, omitting in printing)

EXHIBIT H—BRITISH STATUTORY INSTRUMENT
ANNEXED TO AFFIDAVIT OF JOHN N. ROMANS

STATUTORY INSTRUMENTS

1980 No. 281

CIVIL AVIATION

The Carriage by Air (Sterling Equivalents) Order 1980

Made 29th February 1980

Coming into Operation 21st March 1980

The Secretary of State, in exercise of the powers conferred by section 4(4) of the Carriage by Air Act 1961(a) and under that provision as applied by Article 6 of the Carriage by Air Acts (Application of Provisions) Order 1967(b) and now vested in him (c) and of all other powers enabling him in that behalf, hereby orders as follows:

1. This Order may be cited as the Carriage by Air (Sterling Equivalents) Order 1980 and shall come into operation on 21st March 1980.

2. This Order supersedes the Carriage by Air (Sterling Equivalents) Order 1979(d).

3. The amounts shown in column 2 of the following Table are hereby specified as amounts to be taken for the purposes of Article 22 in the First Schedule to the Carriage by Air Act 1961 and of that Article as applied by the Carriage by Air Acts (Application of Provisions) Order 1967 as equivalent to the sums respectively expressed in francs in the same line in column 1 of that Table:

Table

Column 1	Column 2
Amount in francs	Sterling equivalent
	£
250	9.67
5,000	193.00
125,000	4,836.00
250,000	9,672.00

E. H. Whitaker,
An Assistant Secretary,
Department of Trade

EXPLANATORY NOTE

(This Note is not part of the Order.)

This Order specifies the sterling equivalents of amounts, expressed in gold francs as the limit of the air carrier's liability under the Warsaw Convention of 1929, and under that Convention as amended by the Hague Protocol of 1955, as well as under corresponding provisions applying to carriage by air to which the Convention

and Protocol do not apply. It supersedes the Carriage by Air (Sterling Equivalents) Order 1979.

The sterling equivalents have been calculated by reference to the Special Drawing Right (SDR) value of a gold franc converted into sterling at current market rates. The SDR is based on a basket of 16 major world currencies.

A sterling equivalent for 875,000 francs is no longer specified since the Carriage by Air Acts (Application of Provisions) (Second Amendment) Order 1979 (S.I. 1979/931) expresses the limits of the air carrier's liability for the purposes of non-international carriage in special drawing rights instead of gold francs.

EXHIBIT I—FOREIGN DECISION OF *STATE OF THE NETHERLANDS V. GIANTS SHIPPING CORP.*
ANNEXED TO AFFIDAVIT OF JOHN N. ROMANS

[*The Netherlands v. Giants Shipping Corp.*,
Rechtspraak van de Week 321 (May 30, 1981)
(Sup. Ct. of The Netherlands May 1, 1981)]

TRANSLATION FROM DUTCH

The Supreme Court of The Netherlands

Having considered the petition of the State of the Netherlands, having its seat in The Hague (hereinafter "the State"), represented by Mr. E. Korthals Altes, Attorney, Barrister at the Supreme Court, said petition purporting to annul a decision of June 13, 1980 of the Court of Appeal of The Hague;

Having considered the written defense lodged by Giants Shipping Corporation, a corporation under Liberian Law, having its seat in Monrovia, Liberia (hereinafter "Giants"), represented by Mr. C. D. van Boeschoten, Attorney, likewise Barrister at the Supreme Court, said defense purporting, primarily, to declare inadmissible the appeal of the State, and, alternatively, to dismiss that appeal;

Having taken into account the pleadings of Attorney-General Haak—delivered also in the matter No. 11.705—purporting, in the matter under reference, to annul the Court's contested decision, but only insofar as it fixes the amount to which Giants' liability is limited at the equivalent in Netherlands currency of an amount of 12,764,810 gold francs, fixed at 65.5 milligrams gold of 900/1000 fineness, converted at the rate of exchange of the day on which it [Giants] complies with the order of the Court of Rotterdam, given in its decision of November 23, 1979, to furnish security for this amount, and, insofar as, subject to decision by the Supreme Court, it fixes the amount to which, for the moment, Giants' liability is limited, at 12,764,810 [units of] 1/15 Special Drawing Rights considered equivalent to the franc referred to in Article 740d, paragraph 4 of the Commercial Code, as these [Special Drawing Rights] are defined by the International Monetary Fund, converted into Netherlands money according to the valuation method applied by the Fund for its own operations and transactions, at the rate of exchange of the day on which Giants complies with the order of the Court of Rotterdam, given in its decision of November 23, 1979, to furnish security;

Having considered the contested decision and the other documents, from which it appears as follows:

By petition received on June 29, 1979, by the Clerk of the Court, Giants applied to the District Court at Rotterdam with the following requests:

"a. to fix the amount to which Giants' liability, as mentioned in the petition, is limited for the moment at 12,764,810 gold francs, fixed at 65.5 milligrams of 900/1000 fineness;

b. to order that a procedure be instituted for the distribution of this amount;

c. to direct that Giants furnish security by means of a guaranty of the United Kingdom Mutual Steam Ship Assurance Association (Bermuda) Limited, having its seat in Hamilton, Bermuda, for a maximum amount of Fl. 2,210,000.00, increased by legal interest thereon from the day of the decision in this matter, and increased by an amount to cover the costs of the proceedings, to be fixed at Fl. 10,000.00.

d. to order that, when Giants has satisfied the Court that it has complied with the order referred to under c., a magistrate be appointed to determine the statement of dividends of the aforementioned amount and also an administrator thereof;

e. to order that the security bond referred to in this petition be returned when Giants has satisfied the Court that it has complied with the order referred to under c. and when Giants' petition is granted uncontested, or after any written defense has been conclusively rejected;".

Against this, the State lodged a written defense with the aforementioned Court, which contained the following requests:

"a. to fix, for the moment, the amount to which Giants' liability is limited at the market price of the quantity of gold corresponding to 12,764,810 gold francs, fixed at 65.5 milligrams gold of 900/1000 fineness, to be calculated at the price on the conversion date as referred to in Article 740d, paragraph 4 of the Commercial Code;

b. to direct Giants to furnish good and valid security by means of a bank guaranty;"

The Court, having heard counsel for Giants and the State, among others, in chambers, decided on November 23, 1979, as follows:

"Fixes the amount to which Giants' liability is limited for the moment, at the countervalue in Netherlands currency of 12,764,810 gold francs, fixed at 65.5 milligrams gold of 900/1000 fineness, calculated according to the rate of the free market value of that quantity of gold on the day security is furnished.

Directs Giants to furnish security for this amount by means of a guaranty of The United Kingdom Mutual Steam Ship Assurance Association Limited, having its seat and office in Hamilton, Bermuda, increased by legal interest from the date of this decision and also by an amount of Fl. 10,000.00 to cover the costs of these proceedings.

Rejects any other or additional claims."

This decision is based on the following considerations:

"1. that Giants is owner and operator of the Liberian seagoing vessel "Blue Hawk," which collided on December 29, 1978, in Terneuzen with the northern bridge over the outer mole of the western lock and the brake mechanism at the east side of the outer mole of the western lock; that, with respect to that collision, claims for damage to property were lodged against Giants by the State, the Terneuzen municipality and the Taxicentrale [Cab Service] Terneuzen B.V.; that Giants wishes to avail itself of the right to limitation of its liability with respect to said collision, granted it by virtue of Articles 740a through 740d of the Commercial Code;

2. that the Court fixes the net tonnage of the "Blue Hawk" as referred to in Article 740d, first paragraph, of the Commercial Code, and observing the stipulations in the third paragraph of said article, at 12,764.81 tons; that furthermore, the Court, pursuant, to the aforesaid article, limits, for the moment, Giants' aforementioned liability to, and fixes it at, 12,764,810 gold francs, fixed at 65.5 milligrams gold of 900/1000 fineness;

3. that Giants and the State, the latter being joined by the Terneuzen municipality and the Taxicentrale Terneuzen B.V., differ in opinion on the applicable conversion rate of those gold francs, as mentioned in the documents;

4. that, for lack of a valid contractual and/or statutory stipulation on a definite conversion rate to be applied, and also because no introduction of such stipulation can be expected, within a period that

would be reasonable for the matter now before us, that might have allowed anticipation thereon, the Court can hardly determine anything other than that the free market value of the aforementioned legally defined quantity of gold determines at present the conversion rate, even if this implies a greater liability than that according to the arrangements applying until August 1, 1978;

5. that, since this is a case of limitation of liability deviating from that under Common Law, this exception should indeed not be interpreted more broadly to the disadvantage of the injured party, than ensues mandatorily from contract or law;

6. that in its petition Giants has offered to furnish security for the amount of liability to be fixed, increased by interest and costs, by means of a guaranty of The United Kingdom Mutual Steam Ship Assurance Association Limited, having its seat and office in Hamilton, Bermuda, and the Court considers, under the circumstances of the case, such guaranty sufficiently good and valid security, now that the State has not further supported its opposition thereto;

7. that, insofar as Giants' requests as mentioned hereinabove under b. and d. are concerned, the Court shall not consider these matters before Giants has satisfied the Court that the directive stipulated below has been complied with, as these matters are considered premature at this stage of the request;

8. that, insofar as Giants' request as mentioned hereinabove under e. is concerned, it is not possible

to entertain same, as such request cannot now be brought up;".

Giants appealed against this decision with the aforementioned Court of Appeal, which after hearing at its session of April 18, 1980, counsel for Giants and for the State, gave on June 13, 1980, the following decision, which is now contested in the present appeal:

"Annuls, upon appeal, the decision of November 23, 1979, of the Court in Rotterdam, insofar as it:

(1) fixes the amount to which Giants' liability is for the moment limited, at the countervalue in Netherlands currency of an amount of 12,764,810 gold francs, fixed at 65.5 milligrams gold of 900/1000 fineness, calculated at the rate of the free market value of that quantity of gold on the day security is furnished;

(2) rejects the request that the Court issue an order that a procedure be instituted for the distribution of the amount to which liability is limited;

and, deciding anew in these respects:

(1) fixes the amount to which liability is for the moment limited, at the countervalue in Netherlands currency of an amount of 12,764,810 gold francs, fixes at 65.5 milligrams gold of 900/1000 fineness, converted at the rate of the day on which Giants complies with the order, given in the aforementioned decision, to furnish security for this amount;

(2) orders that a procedure shall be instituted for the distribution of the amount to which the liability is limited;

Upholds the aforementioned decision for the rest;

Returns the case to the Court in Rotterdam for further dealing with Giants' request;".

The considerations of the Court of Appeal in the case were:

"1. The present appeal is lodged against a decision given by the Court pursuant to Article 320c of the Code of Civil Procedure, on a request submitted by Giants to the Court pursuant to Article 320a of said Code.

2. The aforementioned request was to the effect, materially and insofar as is relevant at present, that Giants—submitting to avail itself of the right, granted it by virtue of Article 740a of the Commercial Code, to limitation of its liability for claims connected with the collision on December 29, 1978, of the seagoing vessel "Blue Hawk" with the northern bridge over the outer mole of the western lock in Terneuzen — requested to fix (provisionally) the amount of said limited liability, in accordance with the stipulations of Article 740d of said Code, at 12,764,810 gold francs, fixed at 65.5 milligrams gold of 900/1000 fineness and to order that Giants furnish security for same. The request was also to the effect that the Court give order that a procedure shall be instituted for the distribution of the aforementioned amount.

3. In its aforementioned decision, the Court granted the first request, in such a manner that the

amount to which Giants' liability is limited for the moment, was fixed at "the countervalue in Netherlands currency of an amount of 12,764,810 gold francs, fixed at 65.5 milligrams gold of 900/1000 fineness, calculated at the rate of the free market value of that quantity of gold on the day the security is furnished," said security being ordered, at the same time, for said amount, increased by legal interest from the day of the decision and by an amount of Fl. 10,000.00 for the costs of the proceedings. The second request was rejected.

4. The appeal claims, firstly, that the Court wrongfully determined that the amount of the limited liability and the security to be furnished for same be calculated at the rate of the free market value of the mentioned gold francs, and it claims, secondly, that the Court wrongfully rejected the second request mentioned hereinabove.

5. First of all, the question arises whether the present decision is open to appeal, and the Court of Appeal must examine this question officially.

Relative to this question, it must be held that, by virtue of Article 345 of the Code on Civil Procedure, appeal is possible, because according to the law, and in particular also in Articles 320a through 320z and especially in Article 320x of said Code, appeal against a decision such as the present one is not explicitly excluded, and also because neither the effect of the present course of proceedings nor the decision under discussion imply that appeal against it is not permissible.

As also the term [for appeal] mentioned in said article was observed, Giants' appeal is, therefore, admissible.

6. With respect to the first claim put forward by Giants, as stated hereinabove, it must be held that the system of the procedure for the limitation of the liability mentioned in this case implies—as explicitly expressed in Article 740d of the Commercial Code—that in the present case, in which the furnishing of security is ordered, the conversion of the amount in gold francs into Netherlands currency must be made at the rate of the day on which the order to furnish security is complied with. Because at the time of the Court's decision and now, it is not certain at what time Giants shall furnish security, and it is, therefore, not possible to determine, at this time, which rate must be applied, the Court wrongfully determined in the contested decision that the conversion in Netherlands currency of the gold francs must be made at the rate of the free market value thereof, so that this decision must be annulled in that respect. Therefore, all the observations concerning the rate to be taken into account for the conversion, put forward on behalf of Giants and on behalf of the State of the Netherlands, must now be set aside.

7. With respect to the second claim put forward by Giants, as stated hereinabove, it must be held that by virtue of the stipulations at the end of the first paragraph of Article 320a of the Code of Civil Procedure, and the further course of proceedings provided for in the subsequent articles of said Code, the decision granting the request as referred to in Article

320a must also order that a procedure be instituted for the distribution of the amount to which the liability is limited.

Therefore, the Court wrongfully rejected this request, so that the decision must be annulled in this respect and said order must yet be given.”;

Considering that the State contests this decision, basing its appeal on the following grievances:

“Breach of justice and neglect of forms, non-observance of which brings about nullity, as the Court of Justice considered Giants' appeal admissible for reasons mentioned in the aforementioned decision and which are considered repeated and included herein, and subsequently decided in the verdict of the contested decision, thereby partly annulling the decision of the Court in Rotterdam, as mentioned in the verdict of the contested decision, all this wrongfully for the following reasons:

(a) The Court of Appeal wrongfully admitted Giants' appeal, reasoning that, by virtue of Article 345 of the Code of Civil Procedure, appeal is possible, because according to the law, and in particular also in Article 320a through 320z and especially in Article 320x of said Code, appeal against a decision such as the present one is not explicitly excluded, and also because neither the effect of the present course of proceedings nor the decision under discussion imply that appeal against it is not permissible.

The legal system, as embodied in the Articles 320a through 320z of the Code of Civil Procedure, the nature of the present decision as well as, in particular, Article 320x of the Code of Civil Procedure,

really does oppose the possibility of appeal against a decision such as the one under discussion, given by the Court by virtue of Article 320c of the Code of Civil Procedure.

(b) The Court of Appeal held wrongfully that the system of the procedure for the limitation of the liability implies—as also explicitly expressed, according to the Court of Appeal, in Article 740d of the Commercial Code—that in the present case, in which the furnishing of security is ordered, the conversion of the amount in gold francs into Netherlands currency must be made at the rate of the day on which the order to furnish security is complied with, and that, as at the time of the Court's decision, like now, it is not certain at what time Giants shall furnish security and it is, therefore, not possible to determine, at this time, which rate must be applied, the Court wrongfully determined in the contested decision that the conversion into Netherlands currency of the gold francs must be made at the rate of the free market value thereof. The Court of Appeal also decided wrongfully that all the observations concerning the rate to be taken into account for the conversion, put forward on behalf of Giants and on behalf of the State of the Netherlands, must now be set aside.

Judging thus, the Court of Appeal omitted, wrongfully, to determine at which rate—of the day on which Giants complies with the order to furnish security—the amount of 12,764,810 gold francs fixed at 65.5 milligrams gold of 900/1000 fineness is to be computed.

In this respect, the Court of Appeal ought to have confirmed the contested decision of the Court in Rotterdam and fixed the amount to which Giants' liability is for the moment limited, at the counter-value in Netherlands currency of an amount of 12,-764,810 gold francs fixed at 65.5 milligrams gold of 900/1000 fineness, calculated according to the rate of the free market value of that quantity of gold on the day security is furnished.";

Considering that Giants, in its statement of defense lodged with the Supreme Court, supported its appeal against the admissibility of the appeal to the Supreme Court by the State with the following arguments:

"The State apparently takes the position that it is one of the parties that appeared in one of the previous instances and that it can, therefore, appeal to the Supreme Court by virtue of Article 426, paragraph 1 of the Code of Civil Procedure. Giants is of the opinion that the State cannot be regarded as a party that appeared in the previous instances and was also not regarded as such by the Court of Appeal. In the appeal proceedings at the Court of Appeal the State has not submitted a statement of defense and the Court of Appeal mentioned the State in its contested decision only as "... one of the parties mentioned by Giants toward whom it is of the opinion it can invoke the right to limitation of its liability." The nature of the proceedings under reference implies, furthermore, that those toward whom the limitation of liability can be invoked cannot oppose in a suit such as the one under reference the

(provisional) limitation of the shipowner's liability, but must follow to that end the judicial proceedings initiated with the statement of defense by virtue of Article 320g, paragraph 1 of the Code of Civil Procedure. It results from the above that the State is not permitted to appeal to the Supreme Court.

Whereas:

1. Giants argued that the State's appeal to the Supreme Court is not admissible, submitting that the State cannot be regarded as having appeared "in one of the previous instances" in the sense of Article 426, paragraph 1 of the Code of Civil Procedure. This argument must be rejected.

2. The Court mentions in its decision of November 23, 1979, that it has "seen" the State's statement of defense received on July 6, 1979, lodged by the State's solicitor E.C.G. Klinkhamer, Attorney. From this, it must be concluded that the Court permitted the State to submit a statement of defense. The decision also states that the Court, by virtue of its decision of July 6, 1979, which ordered, among other things, that the State be summoned, had heard B. D. Wubs, Attorney in The Hague, counsel for the State. All this means that the State did appear in the first instance in the sense of Article 426, paragraph 1. Though the creditors do not have the right to submit a statement of defense against a request as referred to by Article 320a and though the judge is not obliged to summon the creditors mentioned by the petitioner, no stipulation in the law prevents the judge from permitting the submission of a state-

ment of defense and from ordering the creditors to be summoned. In particular, the possibility provided for by Article 320g, paragraph 1, second sentence, to submit, when the distribution procedure proper has been started, a statement of defense relating to the points mentioned therein, does not prevent the judge from offering the opportunity for defense already in an earlier stage, i.e., that of dealing with the request as referred to in Article 320a. If a creditor availed himself of this opportunity, he did appear in the sense of Article 426, of paragraph 1.

Furthermore, as appears from the decision of the Court of Appeal on the written appeal lodged by Giants, B. D. Wubs, Attorney in The Hague, counsel for the State, was "heard at the session of April 18, 1980." This means that the State also did appear in the appeal before the Court of Appeal in the sense of Article 426, paragraph 1, even though the State—as Giants argued—did not lodge a statement of defense in the appeal proceedings.

The State's grievances as to the nonadmissibility of the appeal to the Supreme Court must therefore be rejected.

3. Part a. of the grievance refers to the question of whether the possibility of appeal by the petitioner—the debtor—is open on a decision on a request as referred to in Article 320a.

Firstly, the question arises if such a decision can be regarded as "a judgment of the Court" in the sense of Article 320x, paragraph 2. A combination of arguments leads to a negative reply.

The latter stipulation speaks of a "judgment," whereas in Article 320i the determination mentioned in Article 320c is called a "decision." Article 320x, paragraph 2, speaks of the "day of pronouncement"; it is not plausible that in the system that was in the mind of the legislator, there was room for a pronouncement of a decision on a request as referred to in Article 320a. The short term for appeal—four weeks—is evidently connected with the legislator's desire to accelerate the distribution procedure; same can be started only after the debtor has complied with the order given him by the Court, as referred to in Article 320c, paragraph 1. The decision on the request referred to in Article 320a, however, precedes the distribution procedure proper, so that the reason to determine a short term for appeal does not apply here. Finally, the mandatory notification to the Clerk of the Court, stipulated in paragraphs 3 and 4 of Article 320x, is evidently connected with the tasks with which the Clerk of the Court is charged by various articles—such as Article 320l and Article 320t, paragraph 1—within the framework of the distribution procedure. The decision on a request as referred to in Article 320a is given, however, in an earlier stage and one cannot see what sense a notification to the Clerk of the Court would have at that stage.

All this leads to the conclusion that Article 320x, paragraph 2, does not refer to a decision on a request as referred to in Article 320a.

4. It should, therefore, now be examined if Article 345 implies that appeal on such a decision is open to the petitioner.

If the request is rejected, or is granted in such a manner that the petitioner—i. e., the debtor—is aggrieved by it, he may appeal against the decision by virtue of Article 345. Neither the law nor the nature of the decision are opposed to it. At this stage, the only question that is relevant is whether, and if so under which conditions, the debtor will be able to have the distribution procedure started. In these cases, the debtor has an interest to submit these questions to the judge in appeal. Article 320*g*, paragraph 1, last sentence—which the State invoked in particular—plays a role only in the next stage, i. e., in that of the distribution procedure proper. For this reason already, that article does not stand in the way of allowing the petitioner the right of appeal with respect to the decision on a request as referred to in Article 320*a*.

5. The above implies that the Court of Appeal was right in admitting Giants' appeal. Therefore, Part a. of the grievance must be rejected.

6. The grievance under b. has a twofold bearing. In the first place, it purports to argue that the Court should not have abstained from answering the question according to which criterion the amount of 12,-764,810 gold francs, mentioned in the decision of the Court of Justice, should be converted into Netherlands currency. Furthermore, it purports to argue that that criterion should serve the free market value of the quantity of gold involved, on the day security is furnished.

The Supreme Court will address itself first to the question of whether the Court of Appeal should have expressed its opinion on the question of the criterion.

7. The arrangement contained in Articles 320a-320z, as determined by the Law of June 3, 1965, Official Gazette No. 239, differs insofar as is relevant to this case, from the earlier arrangement, in the sense that under the present arrangement the court fixes the amount to which the liability of the debtor is limited for the moment (Article 320c, first paragraph), whereas, previously, the law (in the old Article 320a) referred, for the magnitude of the amount to be paid by the debtor, to the relevant articles of the Commercial Code. This means that under the old arrangement, it was initially left to the debtor to determine that amount—with the understanding that during the distribution procedure each creditor could contest the “sufficiency” thereof (old Article 320l)—whereas at present, the magnitude of the amount the debtor must pay, or for which he must furnish security, is immediately put under the supervision of the court. The legislator, in so determining, will have intended that the calculation of the amount in accordance with the criteria mentioned in Article 740d, paragraphs 1, 2 and 3 of the Commercial Code shall be supervised. The question of what, for the conversion referred to in Article 740d, paragraph 4, should be considered as “the rate of the day” of payment, or of furnishing security, was not a problem in the opinion of the legislator; however, in the case before us, it does present a problem, since, as will be discussed in point 10 hereunder, at the time the Court of Appeal pronounced its decision—and also at the time of the decision of the lower court—the official parity of the guilder expressed in gold no longer existed. According to the

documents of the case, this problem was the subject of a debate in the first instance and in the appeal; it was, in fact, the issue of the dispute. Under these circumstances, the Court of Appeal should not have abstained from answering this question.

As it is, the intent of the arrangement—that not the debtor but the judge fixes the amount to which the liability is limited for the moment—implies that the judge must express himself in the order to be given by virtue of Article 320c, paragraph 1, on the debated point of the criterion for conversion, to avoid that the debtor himself, when making payment or furnishing security, initially establishes the criterion for the conversion, and, therewith, the magnitude of the relevant amount. In this connection, it must also be noted that Articles 320d, 320e and 320f, paragraph 1, assume that by means of the order given by virtue of Article 320c, paragraph 1, it can be shown that the debtor complied with that order: and this also involves that the order should not leave any uncertainty—in cases such as the one before us—on the crucially important point of the criterion for conversion.

Therefore, Part b., insofar as it submits the grievance that the Court of Appeal wrongfully abstained from determining that criterion, is well-founded.

8. Insofar as Part b. purports to argue that the conversion referred to in Article 740d, paragraph 4 of the Commercial Code must be made with due regard to the free market value of gold, it must be rejected on the grounds following hereafter.

9. In its judgment of April 14, 1972, Netherlands Case Law 1972, 269, the Supreme Court gave a decision on the manner in which that conversion must be made, which was based, among other things, on considerations drawn from the wording, the history of the origin and the intent of the Treaty, concluded in Brussels on October 10, 1957, on the limitation of liability of owners of seagoing vessels, for the implementation of which Treaty Articles 740a through 740d were incorporated in the aforementioned Code. That decision held, as long as there are international agreements among a large majority of countries that are a party to said Treaty, on the mutual currency relations that are based on a common valuation of gold, the conversion into Netherlands currency of the franc referred to in said article—hereinafter referred to, for the sake of shortness, as the franc—must be made on the basis of the official, i. e., the legally fixed, parity of the guilder expressed in gold at the time of said conversion, and not on the basis of the rate of gold quoted at that moment on the free market.

10. Since that time, far-reaching developments have occurred in the international monetary field, which led to the Second Amendment to the Articles of the Agreement of the International Monetary Fund (Journal of Treaties 1977, 40), approved for the Kingdom by the Law of March 23, 1978, Official Gazette 173, and, in connection therewith, to the introduction, effective as of August 1, 1978, of the Law concerning the rate of exchange of the guilder, and the repeal, connected therewith and effective as of the same date, of the Law on the par value of the guilder.

These developments indicate, insofar as is relevant here, and as far as the Netherlands are concerned at least since the aforementioned date, that gold has lost all monetary significance. One cannot speak any more, at present, of an official parity of the guilder expressed in gold. This means that in the light of the objectives of the Treaty of 1957—as expressed by the Supreme Court in its aforementioned judgment—the appropriateness of the franc, expressed in gold, to serve as a generally accepted unit of account for determining internationally uniform limits of liability was lost.

11. Consequently, a lacuna occurred in Article 470d and in the stipulation of the treaty on which it was based. To fill same, steps were taken meanwhile, both on the international level and by national legislators, which led to the adjustment of the Treaty of 1957 to the new monetary situation by means of a Protocol established in Brussels on December 21, 1979, amending said treaty, and to similar adjustments of the national legal arrangements in various countries by means of legislative measures; in this country, a draft bill (No. 15.459) for such a law was passed by the Second Chamber of Parliament on February 17, 1981.

However, as long as the adjustment arrangement as referred to hereinabove has not yet force of law in the Netherlands, the judge cannot—also because of the considerations under point 7 hereinabove—abstain from giving a conversion standard.

12. The point of departure should be the preference—underlying the Treaty and, therefore, Article

740d as well—for a standard which is current in the international monetary field for determining the internationally uniform limits of liability intended by the Treaty.

To convert the franc in the manner the State pleads in these proceedings, according to the price of gold on the free market, would be contrary to this point of departure. The aforementioned point of departure will rather lead to joining the choice made by the Member States of the International Monetary Fund for a unit of account which is suited to be used as such in international payments, since gold has ceased to be a monetary standard. The choice fell on the Special Drawing Right (SDR) of the aforementioned Fund, the value of this unit being initially expressed in gold, i.e., a weight amounting to approximately 15 times the gold weight of the aforesaid franc.

This ratio, and the circumstance that, when gold as a value standard of the SDR was replaced by a collection of national currencies (the so-called standard basket), and the new criterion was chosen in such a manner that at the moment of change, the value of the SDR was the same according to both criteria, make it possible to join this choice by considering the franc equal to 1/15 SDR for its conversion into Netherlands currency and to effect the conversion according to the valuation method applied by the Fund for its own operations and transactions.

13. To fill the lacuna in this manner is in harmony with the legal conceptions adopted since, as these find their expression in the arrangements made

recently that aim at the adjustment of international treaties and national laws to the changed monetary situation. With respect to various treaties in which the franc is used as unit of account, amending protocols were adopted, such as the one already mentioned, that prescribe that the franc be considered equal to 1/15 SDR for conversion into national currency; the same applies with respect to the adjustment legislation adopted in several countries and, likewise, the aforementioned draft bill opted for this solution.

14. Objecting to conversion of the franc on the basis of 1/15 SDR, the State submitted that the value of the SDR in terms of purchasing power had considerably declined since the time when this unit was still expressed in the aforementioned weight of gold; as a consequence thereof, conversion of the franc on the aforementioned basis leads to a real reduction, which cannot be neglected, in the liability limits provided for in the Treaty and in Article 740d. This circumstance cannot, however, become a decisive factor when the judge makes his choice on how to fill the lacuna. Even if the aforementioned limits would require revision in connection with the decline of the purchasing power of the unit of account to be applied, it is not the task of the judge to provide for this, but it is up to the legislative body of the treaty and/or the national legislator to intervene.

It is worth noting, in this connection, that on November 19, 1976, a Treaty was concluded in London—which has not yet taken effect, however—on the limitation of liability for maritime claims (*Journal of Treaties* 1980, 23). This Treaty is intended to replace

the Treaty of 1957 and contains considerably higher limits of liability, expressed in SDRs.

15. The fact that Part b. of the grievance, insofar as it concerns the complaint described hereinabove at the end of point 7, is founded, implies that the decision of the Court of Appeal cannot be upheld, insofar as the Court of Appeal held that it could abstain from making a decision on the point in dispute between Giants and the State concerning the conversion criterion to be applied. The Supreme Court can settle the case itself.

It follows from the above considerations concerning the conversion criterion, that grievance 1 of the appeal is founded, insofar as it argues that the franc is to be considered equal to 1/15 SDR for the purpose of conversion. No appeal to the Supreme Court was made against the decision of the Court of Appeal on grievance 2.

The above leads to the conclusion that the decision of the Court of Appeal only need be completed to the extent that it is necessary to state the criterion—mentioned below—for the conversion of the amount in francs mentioned by the Court of Appeal;

Annuls the decision of the Court of Appeal, but only insofar as the Court of Appeal omitted to state the criterion according to which the relevant amount in francs is to be converted;

Fixes the amount to which Giants' liability is limited for the moment, at the countervalue in Netherlands currency of 12,764,810 francs fixed at 65.5 milli-

grams gold of 900/1000 fineness, this franc to be considered equal to 1/15 Special Drawing Right as it is defined by the International Monetary Fund, and at the rate of the day on which security is furnished, to be converted in Netherlands currency in accordance with the valuation method applied by the Fund for its own operations and transactions;

Rejects the appeal in all other respects.

So done by Deputy Chief Justice Ras and Justices Haardt, Royer, Martens and de Groot, and so pronounced by the aforementioned Mr. Haardt, Attorney, in public session on the first of May nineteen hundred and eighty-one, in the presence of the Attorney-General.

(signatures)

(signature)

(Rubber stamp:

Certified true copy)

*The Clerk of the Supreme Court
of the Netherlands*

(signature)

CERTIFICATION

I, Irwin K. Styles, of ALL-LANGUAGE SERVICES, INC., 545 Fifth Avenue, New York, New York 10017, hereby certify that the foregoing is a true and faithful translation of the original document.

IRWIN STYLES

JA97

EXHIBIT J—FOREIGN DECISION OF
LINEE AEREE ITALIANE V. RICCIOLI
ANNEXED TO AFFIDAVIT OF JOHN N. ROMANS

Translation from Italian

THE REPUBLIC OF ITALY

IN THE NAME OF THE ITALIAN PEOPLE

THE CIVIL COURT OF ROME

DIVISION IV

consisting of the following judges:

Dr. Salvatore CASELLA — President

Dr. Ivo GRECO — Judge

Dr. Francesco VIZZA — Judge,

sitting in the Court's chambers, hereby issues the following:

JUDGMENT

in the civil case of first instance, recorded as No. 16368
in the General Register of Legal Actions for 1973, rendered
in the session in open court on 10/10/78, in the dispute

BETWEEN

Linee Aeree Italiane (L.A.I.), currently in liquidation,
represented by the person of the provisional liquidator
with elective domicile in Rome, Via del Traforo 146, c/o
the chambers of his counsel Edoardo Marino, who represents
it by virtue of the power-of-attorney granted to him.

Appellant,

and

Eugenio Riccioli, assisted by his daughter Marianna Riccioli, with elective domicile in Rome, Via di Villa Emiliani 11, c/o the chambers of Rosario Pettinato Marchese, his legal counsel who represents same by virtue of the power-of-attorney granted to him.

Respondent.

SUBJECT: objection to payment order.

RELIEF REQUESTED

During the hearing of January 13, 1978 for submitting requests for relief, counsel for Appellant submitted the following specific requests:

"I hereby request the Court of Rome to reject any request to the contrary, and:

- (1) to stay in accordance with the law, the execution of the judgment of the Rome Appeal Court, No. 2358/71, fully described during my pleadings;
- (2) to declare the payment order served on behalf of Riccioli on June 27, 1973 to be null and void;
- (3) to order, as a subordinate measure and, provided that the executing judge feels able to release the funds, payment of the balance due to Mr. Riccioli, i.e. 284,065 lire in addition to the interest on the arrears and in addition to the legal costs referred to in the previous judgment; the plaintiff is prepared to pay this sum to Riccioli immediately, subject to the pending appeal and therefore without consenting to the order for execution included in the above mentioned judgment of the Appeal Court;

(4) to order Riccioli, as above assisted by his daughter, to pay the fees and costs of the present judgment.

Reserving all other rights."

HISTORY OF THE CASE

In the summons issued on 9/29/1960, Eugenio Riccioli declared that as a result of a crash-landing on 12/29/51 near Malpensa Airport in a I Luck aircraft belonging to L.A.I. (Linee Aeree Italiane S.p.A., now in liquidation) he had suffered personal injuries.

After long negotiations, Riccioli reached a settlement with the Airline, as a result of which he received the sum of Lire 4,900,000 in 1957.

Subsequently, the after-effects of the injuries received in the accident worsened and Riccioli brought L.A.I. before the Court of Rome to request further compensation for his injuries.

In judgments rendered on 12/5/1964 and 1/21/1965, the Court of Rome granted Riccioli a further sum of 300,000 lire as damages, under Art. 948 of the Navigation Act (amended by Arts. 3 and 4 of Law No. 202 of 4/16/54), which provided that the maximum damages due for injuries sustained in an accident was Lire 5,200,000 (Lire 5,200,000 — 4,900,000 = lire 300,000).

The Appeal Court of Rome, considering Riccioli's claim on appeal, set aside the judgment of the Court of Rome and found that the Warsaw Convention of October 12, 1929 should apply, according to which (Art. 22) 125,000 gold francs was the maximum amount which could be claimed for personal injuries, and accordingly ordered

L.A.I. to pay further damages to Riccioli, being 'the difference between the sum of Lire 4,900,000 already paid to the injured party and the equivalent of 125,000 gold francs in Italian lire.' On 6/27/1973 Riccioli, who meanwhile had lodged an appeal with the Supreme Court against the decision of the Appeal Court of Rome submitted to L.A.I. a claim for the sum of Lire 24,039,816. L.A.I. rejected this claim on the grounds that:

(a) the sum claimed by Riccioli was justified and payable but not in the amount claimed, since it could not be determined by a simple arithmetic calculation;

(b) that Riccioli had deducted from the 125,000 gold francs due according to the Warsaw Convention, but wrongly determined on the basis of the normal French franc, the sum of Lire 4,900,000 without taking due account of the fact that at the time of the transaction said sum was already worth 117,780 gold francs;

(c) that in order to calculate the remaining value of the gold francs, Riccioli had wrongly referred to the quoted currency values and not to the gold content of the individual currencies in relation to the gold content of the Warsaw franc.

It therefore requested the Court to declare Riccioli's claim null and void, and to order Riccioli to pay the costs.

Riccioli contested the grounds for their request, and requested the Court to reject it.

After hearing the pleas of both sides, the Court deliberated on the facts, and holding that the evidence submitted for calculating the equivalent in Italian lire had been furnished by Alitalia, which was not a 'Public Ad-

ministration' under the terms of Art. 213 of the Code of Civil Procedure, reserved judgment on the case, ordered an expert's report and requested the parties to appear before the investigating magistrate for a discussion of the procedure to be carried out.

When the expert's report had been completed by Dr. Marchetti, an official of the Central Exchange Control Board, both parties formulated again their requests for relief and the case was submitted again to the Court for its decision.

REASONS OF THE JUDGMENT

Art. 22 of the Warsaw Convention of 10/12/1929, ratified and made effective in Italy by virtue of Law 841 of 5/19/1932, limiting the carrier's liability for personal injuries to 125,000 gold francs, understood by the term "franc" a currency unit (the French franc) composed of 65.5 mg. of gold, of a fineness of 900/1000.

The Article in question (subsection 4) provided that the carriers could convert this sum into their national currency on the basis of the gold content.

Accordingly, and in view of the fact that the Appeal Court of Rome had ordered LAI to pay 'the difference between the sum of 4,900,000 lire . . . and the lire equivalent of 125,000 gold francs, calculated on the day of payment,' the main point of this case is to determine the lire equivalent of one gold franc.

The technical expert pointed out that since the Italian Government, on 2/4/1973, had decided to allow the lira to float freely, it is no longer possible—today—to determine the ratio between the gold content of the lira and that of

other currencies, and that one cannot even indirectly determine the gold content of the lira today.

Moreover, the gold content could not be determined on the basis of the provision by which the Bank of Italy was authorized to compute its gold holdings on the basis of the quotations on the international market.

The reason for this is that the determination of this value is merely a convention.

It is not possible, therefore, to work out an 'official' value-equivalence between the Italian lira and the French gold franc referred to in the Warsaw Convention.

However, there are various criteria by which the value of the Warsaw franc can be expressed in Italian lire, and one of these (of the many indicated by the Exchange Control Board) seems to the Court to be closer to the 'official' value; this is the value calculated on the basis of the Special Drawing Rights, defined in January 1976 by the International Monetary Fund which issues a daily quotation therefor on the basis of the market value of a basket of 16 currencies (CTU report page 6).

On 12/31/1976, this unit of account was quoted at 1,016.60 Italian lire.

The gold content of the SDR in 1970 was quoted at 0.88867088 grams of fine gold, which makes it possible to calculate the gold franc value in terms of Italian lire at 67,438, using the following calculation provided by the Exchange Control Board (page 7):

$$\frac{0.88867088}{0.5895} = 15.075; \quad \frac{1016.60}{15.075} = 67,436 \text{ lire}$$

where 0.88867088 is the fine gold content of the SDR; 0.05895 is the fine gold content of the 'Poincare' French franc (defined by the Law of 6/25/28—cf. Exchange Control Board report on p. 1); 1016.60 is the equivalent value in Italian lire of the SDR quoted on 12/31/76; and 15.075 is the ratio between the fine gold content of the SDR and the 'Poincare' French franc.

On the basis of this ratio, and taking the Lire equivalent of the gold franc, it is now possible to work out the value in Italian lire of the maximum damages due for personal injuries laid down in Art. 22 of the Warsaw Convention: $125,000 \times 67.436 = \text{Lire } 8,429,500$. Since Riccioli has already received the sum of Lire 4,900,000, the difference between the maximum amount due and the amount already received, as the Appeal Court of Rome rightly found, is Lire 3,529,500 ($8,429,500 - 4,900,000$).

It should be noted, in this connection—, that it is not possible to calculate the value in 1957 (when the Riccioli-LAI transaction was effected) of the Lire 4,900,000 in order to determine the percentage of the 125,000 gold francs corresponding to the payment already made.

Since this Court merely shall interpret the judgment of the Appeal Court of Rome, it cannot go beyond the effective tenor of the judgment.

The Appeal Court of Rome had ruled that LAI shall pay to Riccioli 'the difference between the sum of Lire 4,900,000 . . . and the equivalent of 125,000 gold francs, calculated on the day of settlement.' It therefore follows that the only possible way of calculating this is to determine the current lire equivalent of 125,000 gold francs and

deduct the sum of Lire 4,900,000, excluding any other calculation or consideration.

It should also be stated that the substance of the Warsaw Convention cannot be deemed to be a 'gold clause,' as the defendant maintains, linking the settlement to a value that is automatically adjusted to the market value of gold.

There is no doubt that Art. 22 of the Warsaw Convention intended to refer to the actual value of the damages in terms of a single criterion, but, at the same time, one which would evolve in the course of time. The reference to the gold franc and its fine gold content can only be construed as the intention to lay down a system for calculating the damages through the currency exchange system, which would be able to guarantee the real value of the damages simply by selecting the fine gold content of a given currency as a unit of value. Otherwise the Convention would not have made any reference to a currency (gold franc), but simply have expressed the amount in terms of a given quantity of fine gold. This would be the only case in which one could rightly refer to the market value of gold. But, as we have seen, the interpretation which most closely reflects the will of the international legislators excludes valuation, which in any case would have led to a totally different sum payable in settlement.

To conclude, and adopting a criterion that is very close to the official exchange rate between the two currencies, the court holds that the criterion to be followed is the one which best reflects the intention underlying the Warsaw Convention.

Accordingly ,the claim for damages served on LAI on 6/27/1973 is therefore reduced to Lire 3,529,500 for the capital due, and the other moneys claimed shall be reduced proportionally.

In view of the specialized nature of the question, and the fact that both parties have mutually compromised in part, the Court feels that there are just grounds for considering that both parties to the hearing have been fairly compensated for their legal costs.

THEREFORE

The Court, in its final judgment, having heard the Counsel for both parties, reduces the capital claimed on 6/27/1973 by Eugenio Riccioli from LAI in settlement to Lire 3,529,500, and the other items in proportion thereto.

It also declares that both parties' costs have been settled. Rome, 11/14/78.

(signed . . . sealed . . .)

CERTIFICATION

I, Irwin K. Styles, of ALL-LANGUAGE SERVICES, INC., 545 Fifth Avenue, New York, New York 10017, hereby certify that the foregoing is a true and faithful translation of the original document.

/s/ Irwin K. Styles

(Jurat dated July 28, 1981 omitted in printing)

EXHIBIT K—EXPERT'S TECHNICAL REPORT IN
THE *RICCIOLI* DECISION ANNEXED TO
AFFIDAVIT OF JOHN N. ROMANS

TRANSLATION FROM ITALIAN
EXPERT'S REPORT ORDERED BY THE
ROME CIVIL COURT,
DIVISION 4, ON 4/5/1976

CIVIL CASE—LINEE AEREE ITALIANE (LAI)
VERSUS SIG. EUGENIO RICCIOLI

I. In respect of the questions put by the 4th Division
of the Rome Civil Court on April 5, 1976:

(a) the 'Poincare' French franc, defined in the Act
dated 6/25/1928 as having a *gold content of 0.05895
grams of fine gold*, was legal tender in 1929. Since
the gold content of the lira at that time was 0.07919
grams of fine gold, the ratio between the two curren-
cies was FF 100=Lire 74.44. The average official ex-
change rate for 1929 was FF 100=Lire 74.8296;

(b) since 1929 official exchange rates and parity val-
ues have changed many times. As stated in (a) above,
in 1929 the exchange rate was FF 100=74.83; the
official exchange rate today is given by the average
official daily rate recorded by the Italian Exchange
Control Board (U. I. C.) and published in the Official
Gazette of the Italian republic.

The following may be noted with regard to the gold
content of the two currencies:

- (1) the 'Poincare' French franc contained, as mentioned
above, 58.95 mg of fine gold, whereas the franc
as defined in the Act of 8/10/1969 contains 160 mg of

fine gold. The ratio between the two—bearing in mind the conversion from Old Francs to New Francs on 1/1/1960—is 0.3684. But since today's French franc is a floating currency, the parity rate as given is only the legal rate, and no longer corresponds to the real exchange rate.

- (2) With regard to the lira, which had the gold content in 1929 that is given in (a) above, it should be recalled that within the meaning of Art. VIII of the International Monetary Fund's Statutes, ratified by Law No. 132 of March 23, 1947, Italy declared, on March 30, 1960, that "625 Lire is the parity rate for one US dollar." Since on that date the gold content of the US dollar was 0.88867088 grams, an equivalent gold content of the lira of 0.00142187 grams can be obtained from the two ratios given above (i. e. $1 \text{ US\$} = \text{Lire } 625$, and $1 \text{ US\$} = 0.88867088 \text{ grams}$). By Decree-Law No. 14, of 1/28/1960, the Bank of Italy was authorized to calculate its gold holdings at the rate of Lire 700.297396 per gram of fine gold, which was exactly the reciprocal of 0.00142187 grams to the lira.

Since 1971, the US dollar has been devalued twice, and its gold content has been reduced to 0.736662 grams of fine gold (the second devaluation was on February 11, 1973, later ratified by Congress, and notified to the I. M. F.); in December 1971 Italy notified the I. M. F. that the 'middle rate' for the lira was $\text{Lire } 581.50 = 1 \text{ US\$}$, without modifying the Decree-Law of 1/28/1960 referred to above. Taking the new gold content of the US dollar in terms of the external

values notified to the I. M. F., namely, 625 lire to the dollar (parity rate) and 581.50 lire to the dollar (middle rate), the gold content of the lira was respectively, 0.00117865 grams and 0.0012668 grams.

On February 4, 1973, the Italian Government decided to float the lira. As a result of this measure, it is no longer possible to work out the ratios discussed above, and it is not even possible to calculate the gold content of the lira indirectly.

With Decree-Law No. 867, of December 30, 1976, and the subsequent Ministerial Order, the Bank of Italy and the U. I. C. were authorized to calculate their gold holdings at the end of each quarter according to the international market quotations. On December 31, the figure thus obtained was Lire 3,178.916 for 1 gram of fine gold.

But these steps cannot help to work out the gold content of the lira because the determination of this value is purely conventional and varies from time to time.

- (c) To work out the lira equivalent of foreign legal tender, the Italian monetary authorities determine a daily official exchange rate for the "exchange account currencies" (the fifteen leading world currencies), while indicative quotations for the other currencies are obtained from the foreign markets (Zurich and London).

There is no official equivalent value for currencies that are not legal tender.

On the basis of these technical reports in reply to the question put by the 4th Division of the Rome

Civil Court, it does not appear to be possible to quote an 'official' lira equivalent for the French franc, referred to in the Warsaw Convention of 10/12/1929. Such an official equivalent depends on the present operation of the international monetary system which permits currencies to float freely, and a free gold market. It is therefore necessary to examine the legal or de facto ratios to serve as a basis for working out the lira equivalent to the franc.

II. Below we give a resume of these ratios:

- (1) taking the 'parity' rate as 1 US\$=625 lire, and the US\$ gold content at 0.88867088 grams we obtain from the two ratios and the gold content of the 'Poincare' franc, for the latter a value of lire 41.46, computed as follows:

$$\frac{0.88867088}{0.05895} = 15.075 \quad 625 \div 15.075 = 41.46.$$

- (2) Since 1971, the United States dollar has been devalued twice, reducing the gold content to 0.736662 grams of fine gold, and Italy has allowed the lira to float freely, after a period in which it applied the 'middle rates' system, notifying the IMF that 1 US\$ was worth lire 581.50.

On the basis of these new ratios, the gold franc would be worth, respectively:

(a) Lire 46.53 and (b) 70.022, obtained by the following calculations:

$$(a) \frac{0.736662}{0.05895} = 12.496 \quad 581.50 \div 12.496 = 46.53$$

$$(b) \frac{0.736662}{0.05895} = 12.496 \quad 875 \div 12.496 = 70.022$$

(lira exchange rate on 12/31/76)

The ratio given in (2) is also used by the Bank for International Settlements, whose balance sheet is prepared in gold francs, although with a different gold content;

- (3) in January 1976, the IMF decided to gradually reduce the role of gold in the international monetary system, and recognized the Special Drawing Rights as the main means of payment, and basis for international reserves. This accounting unit, introduced in 1970, was given an initial gold content of 0.88867088 grams of fine gold & equal to that of the dollar before the 1971 devaluation—which is still used for certain accounting operations between the Fund and the member countries. Since June 1974 the Fund has worked out the daily quotation of the SDRs on the basis of the market value of a basket of 16 currencies. On December 31, 1978, the value was 1 SDR = Lire 1,016.60.

It should be recalled that several countries—such as Germany since March 1973—had already been expressing the value of their currencies in SDRs, rather than in gold or US dollars.

Assuming the SDR to have a gold content of 0.88867088 grams, the gold franc is worth Lire 67.436, which takes also into account the daily SDR value calculated by the IMF.

$$\frac{0.88867088}{0.05895} = 15.075$$

$$1016.60 \text{ (SDR value on 12/31/1976)} : 15.075 = 67.436$$

- (4) Taking the actual gold market price, and the official US\$:Lira ratio (1 oz. of gold = \$137, and

1\$ = Lire 875, at the end of December), the gold franc would be worth Lire 227.215 as follows:

1 gram of gold = \$4.405

$4.405 \times 0.05895 = 0.259$

$0.259 \times 875 = 226.625$.

- III. It is, however, felt that the values given under (2b) and (3) above are the closest to the 'official' values, namely, the values according to which international transactions are made.

To work out the equivalent value of the lira in relation to gold-linked currencies according to pre-existing international agreements for settling specific transactions, one should use the lire value of the SDR which is used for official transactions. This value would, substantially, be the lira value of the currency worked out indirectly on the basis of third currencies 'with an official gold content' (e. g., the US dollar, the Belgian franc, etc.), and the current market exchange rates for the lira against third currencies. This value would also be in line with analogous payments from abroad to Italy, or settled abroad in currencies 'having an official gold content.'

The value thus obtained would be substantially in line with the rate at which the Bank for International Settlements converts lire into gold francs (but with a gold content of 0.29032258 grams), the currency which the bank uses for its balance sheet. Assets and liabilities expressed in different currencies are converted into gold francs if they are in US dollars at

the rate of 1 US\$=0.736662 gram of fine gold, while central bank exchange rates or market rates are used for all other currencies in terms of the US dollar.

With regard to the "value" of the amount of 4,900,000 lire already paid to Mr. Riccioli on December 20, 1957, there appears to be no problem at all.

The Rome Court of Appeal ordered LAI to pay "the difference between the sum of 4,900,000 lire already paid to the injured party, and the equivalent in Italian lire of 125,000 gold francs, calculated on the date on which payment is actually effected."

As (a) it appears to be impossible to convert 1957 lire into gold francs, and (b) the Court expressly speaks of deducting "a sum in lire", once the equivalent value in lire has been computed on the day of payment of 125,000 gold francs, the amount in lire merely has to be deducted therefrom.

[date and signature illegible]

**EXPERT'S REPORT ORDERED BY THE ROME
CIVIL COURT—DIVISION 4, ON APRIL 5, 1976.**

Civil case between Linee Aeree Italiane (LAI) and,
Mr. Eugenio Riccioli.

Meeting with the parties to the case.

Minutes

On March 23, 1977 at 12 noon in my office (Ufficio Italiano dei Cambi), in Rome, Via Quattro Fontane 123, the undersigned, Gian Franco Moschetti, charged by the Rome Court on April 5, 1976, and in execution of the order

given to me on February 23, 1977, began the technical report.

At the invitation issued to both parties on February 23, Mr. Edoardo Marino duly appeared, as Counsel for LAI, requesting me to proceed with the report and to answer the questions posed by the Court.

I asked for some general information, and was given an exhaustive reply. I then deferred the rest of the operation until a reply had been received from the other party.

March 23, 1977

(signature)

Further to my second request, by registered mail dated May 19, Mr. Rosario Pettinato Marchese appeared at my office on May 22, representing Mr. Riccioli, and confirmed that he had nothing to add to the requests made by the Court.

May 22, 1977

(signature)

CERTIFICATION

I, Irwin K. Styles, of ALL-LANGUAGE SERVICES, INC., 545 Fifth Avenue, New York, New York, 10017, hereby certify that the foregoing is a true and faithful translation of the original document.

/s/ Irwin K. Styles

(Jurat dated July 28, 1981 omitted in printing)

EXHIBIT M—FOREIGN DECISION OF *HORNLINE*
A. G. v. SOCIETE NATIONALE PETROLE
AQUITAINE ANNEXED TO AFFIDAVIT
OF JOHN N. ROMANS

Court Decisions—Jurisprudence
HOGE RAAD VAN DE NEDERLANDEN
14-4-72

Voorzitter: Mr. Wiarda

Raadsheren: M. M. Dubbinck, Peters, Ras, Drion

Adv. Generaal: Mr. Berger

Advocaten: Mrs. S. K. Martens, B. W. J. H. de Liagre Bohll

S. S. HORNLAND/S. S. PRESIDENT ANGOT.
Hornlinie A. G./Societe Nationale Petrole Aquitaine.

Summary: COLLISION/LIMITATION OF LIABILITY/
GOLD FRANC/POINCARÉ FRANC/ BRUS-
SELS CONVENTION OF 1957 (Limitation)/
BRUSSELS CONVENTION 1969 (Pollution).

The conversion rate of the gold franc, under the Brus-
sels Convention on shipowners' limitation of liability, shall
be calculated on the basis of the official value of the cur-
rency in relation to the Poincaré' gold unit, and not on that
of the free market.

Conclusion of the honourable Advocate General Berger
LL.M.

My Lords,

For the factual backgrounds of the legal dispute now
placed before Your Honourable Court I would in order to
avoid repetitions, refer to the reasons for Judgement of
the decision appealed against. The question to which the
grounds of Cassation calls for an answer is: in accordance

with what price must the amount expressed in gold francs to which the ship-owner can limit his liability in terms of Article 740 d of the Code of Commerce, be calculated by the Netherlands Courts of Law as at the 2nd May 1969 that is to say in accordance with the "official" price of gold at U. S. \$ 35,—per troy ounce then obtaining or alternatively in accordance with the price of gold on the free market which was at that time considerably higher?

Let it be stated at the outset that the "official" price of gold is the price which was expressed in the provisions of the Bretton Woods Convention of 1944, whereas the price of gold on the free market is the price of a quantity of gold which has to be paid on such a market.

The Arrondissement Court, in the Judgement appealed against, decided in conformity with the view put forward by the Respondent in the Cassation proceedings, that the conversion referred to above has to be effected on the basis of the official price.

After having ascertained that in this matter no decisive meaning can be attributed to the wording of Article 740 d sub-paragraph 4 of the Code of Commerce and that the history of the formation of the International Convention relating to the limitation of the liability of Owners of sea-going ships, of Brussels dated the 10th October 1957 (Trb. 1958, 46) from which the said Article originates, also fails to give a conclusive answer thereto, the Arrondissements Court sought and found the basis of its decision in the tenor of the arrangement whereby the liability of the ship-owner is limited. As was ascertained in the Judgement appealed against, the question here in issue has on a few occasions been touched upon at the Conferences of

Madrid (1955) and Brussels (1957) but a final point of view was never arrived at.

At a previous Conference in Amsterdam (1949) it was stated on the part of a Netherlands representative in a report:

"Avant la Conference d'Anvers un effort avait ete fait de trouver une solution dans le rattachement de la clause-or aux regles du Fonds Monetaire International (l'accord de Bretton Woods). Au cours des debats de la Conference d'Anvers un grand nombre des delegates ont exprime un manque de confiance a l'egard de l'efficacite de l'accord de Bretton Woods, de sorte que la suggestion fut rejete" (Bulletin No. 104, Conference d'Amsterdam 1949, page 33).

In this connection it is perhaps rather interesting to refer to the proceedings at a Meeting of the International Sub-Committee on Limitation of Shipowners' liability and the "Gold Clause held in London on the 6th July 1949 (the report thereof is inserted in the aforesaid Bulletin No. 104 after the Rapports Preliminaires). It was there argued on the part of the representatives from England that a link-up of the limitation of liability with gold would not be advisable because the official price of gold of U.S. \$ 35.— per troy ounce did not tally with the actual price of a troy ounce of gold, which namely amounted to almost \$ 75.— on the free gold markets, of which those of India and Egypt were mentioned. Inasmuch as the British had considered this matter as particularly important, they had, so they intimated, submitted it to two of the most eminent economic experts of Great Britain viz. Sir Henry Clay of the University of Oxford and Mr. Thackstone "who is

Foreign Manager of the Midland Bank". The report continues: "We explained this problem to them, and I think I should here say we have always been extremely grateful for the great trouble they took in this matter, both being very busy men. But the only solution they were able to suggest was that the unit of limitation should be expressed in terms of what is known as the Final Act of the United Nations Monetary and Financial Conference at Bretton Woods. They said, if you express your unit of liability, your £ 100, in terms of, say, the dollar, and when you have to pay a claim you pay the equivalent of that dollar unit in your own currency, the rate of exchange being governed by Bretton Woods you will get as near uniformity of value in whatever country you happen to make your claim". The British Maritime Law Association, however, turned this solution down "as being impracticable and worse than impracticable—decidedly dangerous".

In Madrid and Brussels, as has been already stated above, the question did no more come up for discussion so explicitly. Nevertheless I would not, unlike the esteemed Counsel for the Appellant in the Cassation proceedings, venture to attach thereto the conclusion—by reason of the history of the formation of the Brussels Convention of 1957—that it was the intention of those drawing up the text, that in regard to a conversion as referred to in Article 3 sub-paragraph 6 of that Convention, it was the free market gold price and not the official gold price in accordance with Bretton Woods, which was the basis on which one proceeded. Taking a bird's eye view of that history I would rather think that the delegates at those Conferences (and I have now particularly those of Madrid and Brussels in mind) did not fully visualize the problem

and that they, to a greater or lesser degree conscious thereof, left it unsolved. In this connection it should not be overlooked that in the middle fifties the official gold price and the gold price on those of the free markets which were more within the standpoint of most of the delegates, happened in the actual fact not to diverge very much.

I would here refer to the summary at page 159 of "Die Goldmark te der Welt" by H. Bartels (1960). According to that summary the gold price of an ounce in U. S. \$ in the years 1954 to 1958 inclusive moved near U. S. \$ 35.—at the markets of e.g. Brussels, London, Milan, Paris, Tangier and Zurich. Only Bombay and Karachi were permanently higher than U. S. \$ 50.—

Many delegates will therefore probably not quite have visualized the problem, which had in fact been recognized by some of them. In addition thereto it has to be borne in mind that a vast majority of the delegates at the various conferences always consisted of lawyers who as such were not schooled to solve precarious economic and monetary world problems. I would here recall the opinion which I have mentioned above of the two eminent British economists.

Likewise there is no direct support to be found for the decision of the Arrondissements Court in the history of other Conventions in which a similar gold clause was inserted as in the Convention now under discussion; but no indication either that it should be qualified as wrong. On the contrary! In September 1955 a Conference took place in The Hague for the revision of the Warsaw Convention (1929), a Convention for the unification of cer-

tain provisions relating to International Transport by Air. (Edition Schuurman & Jordens: Code of Commerce, page 603).

By protocol dated the 28th September 1955 the fourth sub-paragraph of Article 22 was *inter alia* replaced. This sub-paragraph was originally reading:

"The figures set out above are deemed to relate to the French franc fixed at sixty five and a half milligrammes of gold of millesimal fineness nine hundred. They can in every national currency be converted in round figures". This fourth sub-paragraph of that Article has become the fifth sub-paragraph and now reads: "The figures given in this Article in francs are deemed to relate to a unit of currency fixed at sixty five and a half milligrammes of gold of millesimal fineness nine hundred. These figures can in every national currency be converted into round figures. The conversion of these figures into a national currency which is not based on gold shall in the event of legal proceedings be effected in accordance with the gold value of such a currency as at the date of the Judgment". It would seem to me that some indication is here indeed noticeable in the direction of the official gold parity of the national currency, the more so in view of the fact that in the report issued by the Chairman of the Netherlands Delegation the figures of the limitation of liability, increased at the Conference, are in every instance—albeit roughly—converted in accordance with the official gold parity of the Netherlands guilder; the figure of the limit fixed at 250,000 gold francs is put on a par with approximately Dfls. 62,000.— and the report furthermore states:

"The proposal adopted is acceptable to the Netherlands. A limitation of the liability to Dfls. 62,000.—is certainly not excessively high. . . ." The gold franc was in this conversion put at Dfls. 0.24. The value of that gold franc was Dfls. 0.240133 as appears from a letter from the Netherlands Bank dated the 8th July 1968 which is amongst the documents. Finally reference should here be made to the statistical schedule inserted on page 249 of the Volume Documents (Doc. 7686-LC/140) of the Conference Internationale de droit prive aerien, La Haye, septembre 1955, in which the conversion of the figure of the limitation was made in the currencies of about seventeen countries in accordance with the official rate of exchange; in a footnote it is pointed out that conversion in accordance with the free market gold price would result in a change in the figures shown.

It would seem to me that the solution which was given by the Arrondissements Court in the present case i.e. conversion in accordance with the official price of gold as at the 2nd May 1969, as nearly as possible approximates the intentions of the makers of the Brussels Convention. The aim of the Convention—as also follows from what I have briefly touched upon above with relation to the Protocol for amendment of the Warsaw Convention—was namely to arrive at a definite fixing of the figure of the limit to which the liability was restricted, in such manner that the said maximum figure would be acceptable to all the parties concerned and that this would in all the relative countries result in an equivalent right of recovery for creditors. Within this ground plan a link-up of the figure of the limitation of liability with the price of gold on the free market does not fit in, because that price,

in times of monetary unrest under the influence of speculative purchases, shows a tendency to rise to a considerably higher level than the delegates at the Conference will have visualized when fixing the figure of the limitation. Conversion of the figure of the limitation to the considerably higher level of the free market price would in an unacceptable manner have interfered with the often arduous negotiations which those delegates had to conduct in order to arrive at the fixing of the figure of the limitation of liability. This now specifically applies in the present instance where the figure of the limitation, calculated in accordance with the official price as at the 2nd May 1969, works namely out at the sum of Dfls. 555,515.—and in accordance with the free market price at Dfls. 705,788.67, so that the difference amounts to over Dfls. 150,000.—. It is not likely that such a fluctuation may be deemed to have been "hereinkalkuliert" (included) at the time of the making of the Convention, inasmuch as the tenor of the Convention is to arrive at a figure of the limitation which is uniform in point of time and place.

The view that the conversion of the gold franc should, as occasion arises, be effected in accordance with the official gold parity of the currency in question is shared by many of those who have occupied themselves with that problem. I may here mention: H. Drion "Limitation of Liabilities in International Air Law" (thesis 1954) on page 183; Schadee "Supplements" to Cleveringa's "Maritime Law" (1966) on page 21; Pineus "Limited Liability in Collision Cases" (1965) on page 39, though vacillating; Collin "The use of a calculation-currency in modern Maritime Law" in the "Legal Weekly" (Rechtskundig Weekblad), 32nd Annual Volume (1969) on page 1443;

Knorr "Das Internationale Brusseler Uebereinkommen uber Schiffsglaubigerrechte von 1967 im kunftigen deutschen Recht" (thesis 1969), who takes the view (vide page 43), that "den Zielen des Haftungsabkommens diametral entgegenstehen wurde, wenn die obere Grenze der Reederhaftung in Abhangigkeit gebracht ware zu so unsicheren wirtschaftlichen und politischen Elementen wie sie im freien Goldpreis enthalten sind" and finally Sotiropoulos in his book quoted by the "Arrondissements" Court in the Judgment appealed from. Nor do I want to fail to refer to the letter from Dr. Walter Muller of the 12th September 1969 to Respondent's Counsel in the Cassation proceedings, in which the former also declares himself in favour of the official gold price.

Dr. Muller's view is of particular importance because he was, as Swiss delegate, a party to the drawing up of the Convention with relation to the legal liability for damage caused by pollution through oil, Brussels 1969 (Trb. 1970 No. 196 and 1971 No. 70). In that Convention the limitation of liability is likewise expressed in gold (Poincare) francs. At the instance of that same Dr. Muller the word "officielle" was at the latest Plenary Session, added in Article VI sub-paragraph 9 after the word "valeur", after Dr. Muller had pointed out that there existed a difference between the official price of gold and the price of gold on the free market. Dr. Muller's proposal was accepted at that Session without any further comments. The clause in question reads: "Le franc mentionne dans cet article est une unite constituee par soixante-cinq milligrammes et demi d' or au titre de neuf cent milliemes de fin. Le montant mentionne au paragraphe I du present article sera converti dans la monnaie

nationale de l'Etat dans lequel le fonds doit etre constitue; la conversion s'effectuera suivant la valeur officielle de cette monnaie par rapport a l' unite definie ci-dessus a la date de constitution du fonds". As against the latter's opinion Prof. R. Jeanpretre (Professor a l'Universite de Neuchatel) in the Schweizerische Juristen-Zeitung (Annual Volume 65, 1969 on page 185), puts forward the point of view that the conversion of the gold franc should be effected in accordance with the price on the free market. Jeanpretre takes the view that the free market price will lead to the uniformity aimed at by the Convention. It would seem to me however that this view puts an undue strain on the actual situation. Firstly, the fluctuations of the price of gold on the free markets are not inconsiderable and secondly, there is at one and the same moment a difference—and at times even a fairly considerable difference—in the price of gold on the different gold markets. Even if it be assumed that the gold franc must be converted in accordance with the gold price on the free market then the surely very important question remains unanswered which free market to choose! The Netherlands delegate Van der Feltz made the following remark on the subject at the Conference in Antwerp: "Another possibility is that the Convention takes as the rate of exchange the average price of gold on the official gold market in London and New York." No further comments followed thereon but it is clear that Van der Feltz did realize that it would not suffice to refer to "the" free gold-market but that a specific market had of necessity to be referred to. Jeanpretre says in his Article quoted above:

"Nous arrivons ainsi a la conclusion que les unites de compte exprimees en or dans les conventions internation-

ales doivent etre' converties en francs suisses au cours de l'or sur le marche, sans egard a la parite prescrite par la loi. Pratiquement, on appliquerae la cours moyen de l' or sure le marche' de Zurich". Comprehensible in the case of a Swiss; but why Zurich and: the average of what! Uncertain elements which do not arise in the case of a conversion in accordance with the official price. Jeanpretre puts forward as an argument against the official price:

"Chaque Etat peut fixer a sa guise la parite-or de sa monnaie, sans egard a la valeur marchande de l'or". Again I feel that I would wish to place a questionmark against this argument. I am of the opinion that internationally there surely exist impediments with regard to amendments in the gold-parity of national currencies. As far as the Netherlands are concerned I would refer to the history of the formation of the Act with relation to the par value of the guilder. In the Memorandum in Reply (Annexure to the Record of the Proceedings of the Second Chamber of Parliament. Session 1962-1963/7074) the Minister of Finance wrote:

"An amendment of the par value is no matter which only effects our own country. The Netherlands are under an obligation to consult thereon with other countries in terms of the Convention relating to the International Monetary Fund, the Benelux Treaty, the Treaty with relation to the European Common Market (E. E. G.) and the Statute for the Kingdom of the Netherlands". It would seem to me that it can hardly be maintained that *our* Minister of Finance "peut fixer a sa guise la parite-or de sa monnaie". I therefore consider the point of view of Jeanpretre as untenable.

I am of the opinion that the "Arrondissements" Court has given a right decision in the Judgement appealed against with relation to the fourth sub-paragraph of Article 740 d of the Code of Commerce, and that for that reason the grounds of Cassation have unsuccessfully been put forward.

I would therefore conclude that the Appeal be dismissed.

After having heard the parties:

After having heard the Advocate-General Berger, on behalf of the Solicitor-General, whose conclusion is to the effect that the appeal should be dismissed and that the Appellant in the proceedings for cassation should be ordered to pay costs of suit in those proceedings;

After having perused the documents;

WHEREAS the Judgement appealed against and the documents filed of record show:

that the Appellant in the proceedings for cassation—Hornlinie—by writ dated the 25th July 1969 sued the Respondent in the proceedings for cassation—hereinafter to be referred to as S.N.P.A.—in the Arrondissements Court at Rotterdam and claimed:

"1) a declaration of right to the effect that, when correctly applying the provisions of Article 740 d of the Code of Commerce, the amount to which S.N.P.A., when making payment in terms of the provisions of Article 740 d sub-paragraph 4 of the Code of Commerce, was entitled to limit its liability for the damage, ensuing from a collision which on the 27th October 1967 had occurred on the New Rotterdam Waterway between the Hornland and the Pres-

ident Pierre Angot, was as at the 2nd May 1969 to be put at Dfls. 705,788.67 or alternatively at such figure as would be arrived at when converting 2,313,360 of the francs referred to in the said Article in accordance with the price of the said franc, or alternatively at the price of 65.5 milligrammes of gold of millesimal fineness nine hundred as at the 2nd May 1969, having regard to the actual value of gold or alternatively to the value of gold on the free market as at the aforesaid date.

2) by Judgement, in so far as possible executable with immediate effect, to order S.N.P.A. to pay to Hornlinie against proper acquittance a sum of Dfls. 150,273.67, or alternatively the figure by which—when correctly applying Article 749 d sub-paragraph 4 of the Code of Commerce—the amount of the limited liability of S.N.P.A. by reason of the aforesaid exceeds an amount of Dfls. 555,515.—; to all of which is to be added interest at the rate of 5% per year from the 2nd May 1969 until the date of payment;

3) in that same Judgement to order S.N.P.A. to pay costs of suit.”;

that after these claims had been contested by S.N.P.A. the “Arrondissements” Court, in its Judgement dated the 23rd March 1971, dismissed the claims put forward by Hornlinie, after having taken into consideration:

(then follows the full text of the Judgment delivered by the “Arrondissements” Court)

(here continues the text of the Decision given in the Cassation proceedings);

that by deed bearing date the 11th June 1971 the parties entered into an agreement to the effect that from

this Judgment an Appeal in Cassation would be noted by Hornlinie, thus by-passing any (other) Appeals;

WHEREAS

Hornlinie contests the Judgment of the Arrondissements Court on the following grounds of Cassation:

(then follows the grounds of Cassation in which it is asserted that the "Arrondissements" Court by its decision violated the Law)

(here continues the text of the Decision in the Cassation proceedings).

WHEREAS

these grounds of cassation raise the question in what manner the franc referred to in Article 740 d of the Code of Commerce has to be converted into Netherlands currency in accordance with the daily price in order to ascertain the amount to which the liability of the Shipowner and of the other persons mentioned in Article 740 a can be limited;

that the Arrondissements Court has based its decision on the view that, with regard to this conversion, one has to proceed on the basis of the parity of the Dutch guilder expressed in the weight of gold fixed by the Netherlands Government, as existing at the time of the conversion, whereas the grounds of appeal assert that one has to proceed on the basis of the quotation of gold on the free market, prevailing at that moment;

that Article 740 a to d inclusive were inserted in the Code of Commerce in order to give effect to the International Convention relating to the limitation of the liability

of Owners of sea-going ships, concluded in Brussels on the 10th October 1957;

that this Convention *inter alia* lays down in Article 3 sub-paragraph 6, of the French text: "Les montants mentionnés au paragraphe 1 du présent article seront convertis dans la monnaie nationale de l'Etat dans lequel la limitation de la responsabilité est invoquée; la conversion s'effectuera suivant la valeur de cette monnaie par rapport à l'unité définie ci-dessus", and of the English text: "The amounts mentioned in paragraph 1 of this Article shall be converted into the national currency of the State in which limitation is sought on the basis of the value of that currency by reference to the unit defined above";

that the said Article of the Convention, in so far as here relevant, has as follows been rendered by the Netherlands Legislator in Article 740 d sub-paragraph 4 of the Code of Commerce: "The said franc shall be converted into Netherlands currency in accordance with the daily price"; that there is no reason to assume that the Legislator by so rendering it in that Code, would have meant a departure in a material sense from the text of the Convention;

that Article 3 sub-paragraph 6 of the Convention by mentioning a conversion on the basis of the value of the national currency and not on the basis of the value of gold, lends support to the view that, when converting the franc into Netherlands currency, one has to proceed on the basis of the official parity of the guilder expressed in gold and not on the basis of the market price of gold;

that this view is also supported by the fact that the States which were parties to the formation of the Conven-

tion, were for the major part also parties to the Bretton Woods Convention, and that there existed certain arrangements between those States within the frame-work of the latter Convention with regard to the mutual relationships between their currencies, whereby those currencies were directly or indirectly expressed in a certain weight of gold;

that furthermore it is to be observed that even though the franc mentioned in the Convention was no longer, at the time of the conclusion of the Convention, an existing national currency but nothing else than a unit of calculation, the fact that that unit of calculation was not sought in a specific weight in gold but in a currency with a certain weight of gold, indicates that when choosing that unit of calculation it was the monetary role of gold, rather than the trading value of that metal, which one had in mind;

that the wording of the said article of the Convention and of the Netherlands Enactment based thereon, are, however, not of such a nature that they would even then inevitably lead to the view mentioned above, if the history or the tenor of the Convention should clearly plead in favour of placing the construction on the Convention which has been asserted in the grounds of Cassation, or if the contested construction would lead to consequences which are difficult to accept and which would be obviated in the event of the other construction being placed thereon;

that in so far as the history of the formation of the Convention is concerned, there is nothing to show that the diplomatic conference at which the text of the Convention was fixed in 1957—apart from the opinions of individual delegates—quite visualized the problem in question, let alone that the conference was desirous of making a deci-

sion on the subject; neither does the history of Article 740 d of the Code of Commerce afford any indication that the Netherlands Legislator held a particular view on the subject:

that, in so far as the tenor of Article 3 sub-paragraph 6 of the Convention is concerned, the choice of a fictitious currency expressed in a weight in gold as unit of calculation instead of any existing national currency, was prompted by the wish not to link-up the fate of the Convention,—in so far as the height of the amounts, to which the liability could be limited, is concerned—to the devaluations and revaluations of a particular currency;

that furthermore in that same article the date of converting the franc into the currency of the country in which the limitation of liability is invoked, is prescribed in order to obviate that the conversion should in advance be fixed in the various national legislations whereby namely the uniformity aimed at by the Convention in the limitation of liability would be defeated as soon as money were devalued or revalued in any one or more of those countries;

that in both respects mentioned here no less justice would be done to the tenor of Article 3 sub-paragraph 6 of the Convention if the view be adopted which is contested by the grounds of Cassation than if the view be adopted on which the grounds of Cassation are based;

that in neither of the two views the result is achieved that the value expressed in purchasing power of the amounts to which liability can be limited, remains equal; that a conversion on the basis of the gold-price on the free market will admittedly in many cases lead to higher amounts than a conversion on the basis of the official par

value expressed in gold of the various national currencies, but that these variations need not necessarily link-up with the purchasing power of the money into which the amount of the limitation of liability must be converted, inasmuch as they frequently will result from causes of a speculative and international-monetary nature;

that on the other hand, as long as international arrangements exist between a substantial majority of the countries which are parties to the Convention, regarding the mutual relations between their currencies whereby a joint valuation of gold is the basis proceeded from, the general tenor of the Convention—viz. the promotion of uniformity in the national legislations with relation to the limitation of the liability of the ship-owner in such a manner that the application of those legal Enactments may lead, as much as possible, to equal results—is better achieved by a rating of the franc which links-up with those international monetary arrangements than by a conversion on the basis of the daily prices of gold which are sometimes widely divergent and vary on the various free gold markets;

that furthermore, in so far as the practical consequences are concerned of the view advocated in the grounds of Cassation, a choice for the conversion of the franc on the basis of the prices of gold on the free market would, in view of the fluctuating character of these prices, lead to the rather unsatisfactory result that the height of the amount of the limited liability would vary according to the day on which the debtor makes this amount available or gives security therefore;

that in view of what has been said above justice can best be done to the tenor of Article 740 d sub-paragraph

4 of the Code of Commerce by the conversion of the franc referred to therein into Netherlands currency, on the basis of the gold-rate of the guilder as fixed by Law;

that this proposition is in no way altered by the disparity, mentioned at the end of the grounds of Cassation, between on the one hand "the official gold-price" and on the other hand the price for which gold changed hands on the free gold-market, which disparity came into existence since March 1968, as a result of the decisions referred to in the grounds of Cassation, of the countries, which until then had formed the so-called gold pool;

that when the said disparity came into existence this did not have the result that the "official gold-price" thereby lost its significance nor that—bearing in mind the aims of the Convention—it ceased to be fit to serve as a uniform standard for the conversion of the gold franc into national currencies;

that this is corroborated by the fact that in 1969 the diplomatic conference which laid down the text of the Convention regarding the legal liability for damage caused by pollution through oil (trb. 1970, No. 196; and 1971, No. 70) and which adopted—with regard to the calculation of the limitation of liability—the same franc as was also used as a calculating unit in the Convention of 1957, did explicitly express a view on the question now before this Honourable Court and adopted the official value of the national currency in relation to the franc as the basis for conversion:

NOW THEREFORE the grounds of Cassation have unsuccessfully been put forward.

Dismisses the Appeal.

EXHIBIT N—FOREIGN DECISION OF *PAKISTAN INTERNATIONAL AIRLINES V. COMPAGNIE AIR INTER S. A.* ANNEXED TO AFFIDAVIT OF JOHN N. ROMANS

TRANSLATION FROM FRENCH

THE FACTS:

The dispute relates to the carriage by air of 51 packages of electronic equipment from HONG KONG to MARSEILLES. According to the air waybill made out on April 6, 1974 by PIA (Pakistan International Airlines), the consignor was the company AMERICAN INTERNATIONAL FREIGHT and the consignee was the company SERRES ET PILAIRE. The forwarding of the cargo was carried out as follows:

PIA entrusted the 51 packages to AUSTRIAN AIR TRANSPORT for the journey HONG KONG—AMSTERDAM. KLM acting as PIA's agent alleges that it received only 45 packages which it carried to ORLY, and handed over to AIR INTER which had them sent, not by air but by road, to MARSEILLES by TRANSPORT ET GROUPAGES DE FRANCE. At arrival in MARSEILLES, the insurance company HELVETIA, subrogated to the consignee's rights, was forced to record that the consignee received only 44 packages. It follows that 6 packages were lost between HONG KONG and AMSTERDAM, or in AMSTERDAM, and that a seventh package was lost between AMSTERDAM and MARSEILLES.

The insurance company HELVETIA, subrogated to the consignee's rights, issued a writ against AIR INTER, and this latter summoned KLM, PIA and TRANSPORT ET GROUPE DE FRANCE in guarantee. On appeal,

AUSTRIAN AIR TRANSPORT was summoned as third party by PIA.

ARGUMENTS OF THE PARTIES:

The aviation company P. I. A. says that it did indeed make out on April 6, 1974, an air waybill for the carriage to MARSEILLES of the electronic equipment in question, but that it had in fact entrusted the first stage of the carriage by air, between HONG KONG and AMSTERDAM, to the company AUSTRIAN AIR TRANSPORT to which the 51 packages were handed over; that the company KLM which took charge of the carriage between AMSTERDAM and ORLY reported in its manifest of April 16, 1974, that it had received and delivered to AIR INTER only 45 packages; that the final consignee received only 44 packages; and that together with KLM it was ordered to relieve and guarantee AIR INTER from the responsibility for the loss of 6 packages within the limits of the Warsaw Convention. As the action must be brought within a period of two years as provided by article 29 of the Warsaw Convention, AIR INTER's action must be declared prescribed further, and in any event, AIR INTER was to summon AUSTRIAN AIR TRANSPORT which had alone carried out the transportation. PIA thus requires the Court to declare AIR INTER debarred, subsidiarily to say that PIA is exonerated, and subsidiarily to order AUSTRIAN AIR TRANSPORT to relieve and guarantee PIA from any responsibility, to order AIR INTER to pay the costs and FF3000 on the basis of article 700 of the New Code of Civil Procedure.

The company AUSTRIAN AIR TRANSPORT summoned by PIA as third party replies that this cause of

action is extinguished as a five-year delay has elapsed since the delivery of the cargo, and furthermore that the action is not admissible as it was introduced against AUSTRIAN AIR TRANSPORT for the first time at the appeal stage when the situation referred to was already in existence when the summons was served. Subsidiarily, AUSTRIAN AIR TRANSPORT argues that the damage report of April 15 mentions a loss on a flight taking place on April 14 when the packages are alleged to have been carried on April 6; that no manifest showing that KLM had received only 45 packages has been produced in the hearing, the manifest made out on April 16 between KLM and AIR INTER indicating that the loss occurred between AMSTERDAM and ORLY. AUSTRIAN AIR TRANSPORT concludes that the demand should be said unacceptable and in any case ill-founded, and the company PIA ordered to pay the costs and to pay AUSTRIAN AIR TRANSPORT FF3000 by virtue of the provisions of article 700 of the New Code of Civil Procedure.

The companies KLM ask to be exonerated and for the decision to be reversed insofar as they were ordered to relieve and guarantee AIR INTER. In reply to the pleadings of AUSTRIAN AIR TRANSPORT which availed itself of article 29 of the Warsaw Convention to have the action struck out in its favor, KLM says that those provisions do not apply to relations among airlines.

The company HELVETIA SAINT GALL, basing itself on the international agreements prohibiting references of currencies to gold, announces that the Poincare franc must be given from now on a value equal to FF1 instead of FFO.36. It requests thus that the Court uphold the de-

cision in its principle and that the order to pay 13,500 francs as defined by the Warsaw Convention be construed as meaning an order to pay FF13,500 of today. It further requires that AIR INTER be ordered to pay HELVETIA the sums of FF1000 for abuse of the process of law and FF1000 by virtue of article 700 of the New Code of Civil Procedure.

For its part, the company AIR INTER means to remind the Court that as a result of the transport manifest of April 16, 1974 made out at the time of delivery of the cargo it received only 45 packages from KLM; that it thus falls to the Court to uphold the decision insofar as it ordered KLM to guarantee AIR INTER in respect of the payments to be made. As the third party action against TRANSPORT ET GROUPAGES DE FRANCE could be considered prescribed by virtue of the provisions of article 108 of the Code of Commerce, AIR INTER nevertheless requires that the decision should be reversed insofar as it ordered AIR INTER to pay FF500 by virtue of the provisions of article 700 of the New Code of Civil Procedure.

AIR INTER also argues that its liability may not be extended beyond the limits provided in article 22 of the Warsaw Convention as amended by the Hague protocol, namely 250 Poincare francs per carried kilogram. The assertion of HELVETIA to obtain that the order to pay 13,500 Poincare francs should from now on mean FF13,500 of today proceeds from a lack of comprehension of the scope of the international monetary agreements which do not concern the relation of moneys of payment, or of moneys of account, between themselves.

The company TRANSPORT ET GROUPEMENT DE FRANCE argues that having made a contract of carriage by road with AIR INTER, the third party action against it is prescribed by virtue of the Code of Commerce, article 108 (1) and (4). It concludes that the decision be upheld with the addendum that AIR INTER be ordered to pay it FF3000 by virtue of article 700.

ON THE PRINCIPAL DEMAND:

Whereas several carriers cooperated in the execution of an international carriage by air, from HONG KONG to MARSEILLES, considered as a single operation, the last carrier had to assume responsibility in relation to the consignee for any damage occurring during the said carriage;

That it is thus advisedly that HELVETIA SAINT GALL subrogated to the rights of the consignee summoned AIR INTER by writ dated April 15, 1976; that in any case this latter no longer contest the justification of this action as it concludes for the decision to be upheld insofar as it ordered it to pay 13,500 francs as defined by the Warsaw Convention;

Whereas however on appeal HELVETIA avails itself of the prohibition to refer to gold in international monetary agreements to argue that the Poincare franc must now be given a value equal to the present day franc and that the order made in first instance to pay 13,500 francs 'as defined by the Warsaw Convention' must be construed as an order to pay FF13,500 of today;

But whereas the agreements known as the Jamaica Agreements to which HELVETIA implicitly refers have

not been ratified by the Parliament and presently do not constitute an international treaty binding France; that the only legal document to consider could only be the second amendment to the By-laws of the International Monetary Fund which prohibits the fixing of a gold parity as a denominator of the national currency, but that that provision does not intend to prohibit all national regulations which institute, save for exchange regulations, a relation between gold and the national currency; that the said amendment came into force on April 1, 1978 and would be without effect on the contract of carriage made out in April 1974;

That as it is a matter to convert a money of account to a money of payment, article 22 of the Warsaw Convention must be applied according to the equivalence of the Poincare franc fixed by the governmental declaration of August 10, 1969;

That it is appropriate to confirm the judgment in that it ordered AIR INTER to pay HELVETIA the sum of 13,500 francs as defined by the Warsaw Convention, and the sum of FF500 to compensate for the loss properly assessed;

That the Court also thinks it equitable to order AIR INTER to pay HELVETIA the sum of FF1000 on account of justified costs set forth by HELVETIA and not to be repeated in the costs.

That as HELVETIA does not prove the abusive character of the appeal, which in any case was justified, there is cause to declare it ill-founded in its demand for damages on this point.

ON THE THIRD PARTY APPEALS:

Whereas AIR INTER summoned KLM and PIA as third parties, and PIA in its turn summoned AUSTRIAN AIR TRANSPORT as third party at the appeal stage;

Whereas the company GENERAL ELECTRONICS whose head office is in HONG KONG had received an order for electronic equipment from the company SERRES ET PILAIRE of MARSEILLES and entrusted the carriage to PIA; that the consignment consisted of 51 packages of a total weight of 424 kilograms and was taken in by air waybill dated April 6, 1974;

Whereas after making out the AWB, PIA had the consignment carried by AUSTRIAN AIR TRANSPORT on that same day as it appears from the exhibits; that it has thus implicated AUSTRIAN AIR TRANSPORT so that it should subsidiarily be ordered to relieve PIA and to guarantee it against any order to pay;

Whereas AUSTRIAN AIR TRANSPORT maintains that this third party intervention is not admissible and deprives it of the double degree of jurisdiction when no new fact has intervened since the institution of the proceedings.

But whereas neither one nor the other of these parties was present in the first instance and that all other companies having participated in this international carriage are represented in appeal, it would be contrary to the good administration of justice to compel PIA to have the dispute re-examined; that there is thus cause to say that the intervention is admissible and to dismiss the argument of extinguishment as the provisions of article 29

of the Warsaw Convention only regulate the relations between carriers and users;

Whereas AUSTRIAN AIR TRANSPORT handed over the cargo in AMSTERDAM to KLM which forwarded it to ORLY where it was handed over to AIR INTER;

Whereas it appears from the exhibits:

- that 51 packages were taken in charge in HONG KONG by AUSTRIAN AIR TRANSPORT which handed them over to KLM in AMSTERDAM;
- that KLM made no reservation when the packages were received;
- that KLM waited until April 16, 1974 to make out in ORLY a document called "AIR CARGO TRANSFER MANIFEST" showing that six packages had been lost as it indicated that 45 packages were being delivered to AIR INTER;
- that KLM proves this loss by producing another document called "damage report" and dated April 15, 1974 indicating that the damage occurred through warehouse theft;

Whereas KLM does not dispute that it handed over to AIR INTER only 45 packages and cannot prove that the loss is the responsibility of AUSTRIAN AIR TRANSPORT, it will thus have to relieve and guarantee AIR INTER up to the value computed on the basis of the weight of 6 packages at a price of FF250 per kg, as defined by the Warsaw Convention.

That in consequence PIA and AUSTRIAN AIR TRANSPORT must be exonerated;

That no consideration of equity justifies the allocation of damages to these two companies on the basis of article 700 of the New Code of Civil Procedure and that they should thus be nonsuited on this point;

Whereas a seventh package was lost between ORLY and MARIGNANE [MARSEILLES AIRPORT] during the carriage undertaken by TRANSPORT ET GROUPAGES; that AIR INTER, considering that its action against this carrier was indeed prescribed in application of the provisions of article 108 of the Code of Commerce, asked for the decision to be reversed only insofar as it ordered AIR INTER to pay TRANSPORT ET GROUPAGES the sum of FF500 by application of the provisions of article 700 of the New Code of Civil Procedure.

Whereas AIR INTER's action does not present an abusive character and in view of the circumstances of the case, no consideration of equity justifies the allocation of damages to TRANSPORT ET GROUPAGES insofar as non-repeatable costs are concerned, that there is thus cause to reverse under this head;

**ON THESE GROUNDS,
THE COURT,**

Deciding on a commercial matter; publicly and after full argument on all sides.

On the form, declares admissible the appeals made by PIA and AIR INTER and the summoning of AUSTRIAN AIR TRANSPORT to appear,

On the content, on the principal claim made by HELVETIA SAINT GALL:

Upholds the referred decision.

And adds that AIR INTER is ordered to pay HELVETIA the sum of one thousand francs (FF 1000) in application of the provisions of article 700 of the New Code of Civil Procedure.

On the third party appeals:

Unsuits AIR INTER of its appeal in guarantee against PAKISTAN AIRLINES,

Upholds the decision for the rest,

Exonerates AUSTRIAN AIR TRANSPORT,

On the counter claim made by TRANSPORT ET GROUPAGES DE FRANCE:

Reverses the decision insofar as it allocated to this company a sum of five hundred francs (FF500) on the basis of article 700 of the New Code of Civil Procedure,

Deciding again on this count, unsuits TRANSPORT ET GROUPAGES DE FRANCE,

Unsuits all parties of any other and contrary conclusions and claims,

Orders AIR INTER to bear the costs of appeal which can be directly recovered from it by Maitre AUBE-MARTIN, SCP ROUGON TOUBOUL, SCP ERMENEUX-MANCINI, SCP SIDER, Maitre GIACOMETTI, substitute for Maitre BOURY, Attorneys, insofar as they paid them in advance without receiving a deposit.

(Signature)

GIRAUD,

(Signature)

TOMASINI,

Certified true copy
The Chief Clerk of the Court
(Signature)

JA143

CERTIFICATION

I, Irwin K. Styles, of ALL-LANGUAGE SERVICES, INC., 545 Fifth Avenue, New York, New York 10017, hereby certify that the foregoing is a true and faithful translation of the original document.

/s/ Irwin K. Styles

(Jurat dated July 28, 1981 omitted in printing)

EXHIBIT O—FOREIGN DECISION OF *CHAMIE V. EGYPTAIR* ANNEXED TO AFFIDAVIT OF JOHN N. ROMANS

TRANSLATION FROM FRENCH

General Roll No. C 00249

Further to an appeal from a judgment by the Tribunal de Grande Instance, Part 7, of 10/6/78.

After full argument on both sides.

Judgment on the merits.

JUDICIAL ASSISTANCE

Admission of
in favor of

Date of closure of proceedings: 10/9/79

COURT OF APPEALS OF PARIS

Part 5, Section C

RULING ON JANUARY 31, 1980

(No. , pages)

PARTIES TO THE SUIT

1°/ *EGYPTAIR* Company, whose main office is at 1 bis, rue Auber, Paris 9.

Appellant and respondent in cross-appeal represented by M. TEYTAUD, Attorney, assisted by Maitre de Geuffre de la Pradelle, Esq.

2°/ Mrs. Lucia *CHAMIE*, nee *JAFALIAN*, residing at VALENCE (Drome), 30 Alee Zamenoff.

Respondent and appellant in cross-appeal represented by SCP GAULTIER, assisted by Maitre M. THORNE, Attorney.

COMPOSITION OF THE COURT

During the hearing and consultation, Chief Judge: Mr. GENDRE. Associate Judges: Messrs. FOURET and AYDALOT.

SECRETARY AND CLERK OF THE COURT:

Mrs. LACHAUX

OFFICE OF THE PUBLIC PROSECUTOR:

Represented by Mr. ECOUTIN, Attorney General, who stated his recommendations.

HEARING:

Hearings in open court of December 6 and 18, 1979.

RULING:

After hearing full arguments on both sides. Pronounced publicly by Mr. GENDRE, Chief Judge, who

signed the record along with Mrs. LACHAUX, Secretary and Clerk of the Court.

THE COURT, ruling on the appeal by the Egyptian Company "Egyptair" to review the judgment of the Tribunal de Grande Instance of Paris rendered on 10/6/1978, ordering Egyptair to pay Lucia CHAMIE nee JAFALIAN the equivalent in French francs of 9,517 Lebanese pounds, according to the rate of the Paris Stock Exchange on this date, with interest at the legal rate reckoned from this same day, as well as the sum of 700 francs and 2,000 francs, as well as costs.

Together with the cross-appeal by Lucia CHAMIE requesting that the Lebanese pound be evaluated as of 8/26/76, the legal interest be calculated from that same date, and that EGYPTAIR be ordered to pay her 3,700 francs in damages and 8,000 francs pursuant to Article 700 of the new Code of Civil Procedure.

The facts of the case and the Procedure were set forth by the Tribunal. It suffices to recall that this litigation concerns indemnification for 50 kilograms of luggage comprised of three suitcases belonging to Mrs. Lucia CHAMIE, which were lost in the course of the EGYPT-AIR flight of 8/26/1976 between Damascus and Paris, via Cairo. She evaluated the sustained loss at 9,517 Lebanese pounds, but was not able to obtain payment. The airline, which acknowledged its responsibility, only offered an indemnity calculated at \$20 (US) per kilogram, that is 4,900 French francs, by invoking the provisions of article 22 of the Warsaw Convention.

On the summons and complaint of CHAMIE, who maintained that the indemnification provided by article 22

of the Warsaw Convention was calculated in monetary units based on gold at the rate of 250 francs per kilogram, the Tribunal estimated that the conversion of the indemnity provided by this article into French currency should be made according to the value of gold on the open market of the Paris Stock Exchange for international bullion on the day of its judgment.

The company, EGYPTAIR, contests this interpretation by asserting that article 22 provides for a ceiling which limits damages for loss of baggage by weight, except when the consigners prove the real value of their baggage according to the general law; and that, since at the time of the signing of the Warsaw Convention in 1929 the national currencies of the contracting countries had a gold standard, with an official rate, specifically in France for the Franc Poincare, this rate was different from that of the open market, fluctuating and uncertain, and subject to speculation by private individuals to the point where one could witness "skyrocketing gold prices." This is contrary to the intention of the Convention's contracting parties, which was to refer to a constant monetary value.

The appellant company invokes the resolution of the Legal Committee of the International Civil Aviation Organization (I.C.A.O.), an organization attached to the United Nations, which in October 1974 deemed that the conversion of currencies fixed in Francs Poincare in the Warsaw Convention into national currencies was not to be effected on the basis of the gold price on the open market. EGYPTAIR furthermore invokes the BRETTON WOODS agreements and particularly the Jamaica agreements of 1974 which, by amending the constitution and by-

laws of the International Monetary Fund, severed the connection of the currencies of the member states to the gold standard; and maintains that these accords could not have had any effect on the application of article 22 of the Warsaw Convention for which, with respect to the French franc, it is necessary to adopt the last gold reference resulting from the government declaration of 8/10/1969 which fixed the value of the franc at 0.3680 milligrams of gold; it therefore offers a sum of less than 100 francs per kilogram and a total indemnity of 4,900 francs for the loss of the 50 kilograms of luggage. The appellant adds that Mrs. CHAMIE cannot claim damages other than those provided by the Convention, with the exception of the court fees and costs.

Mrs. CHAMIE, a Lebanese national, requests that the decision be affirmed with regard to the principal claim, that the conversion of the indemnity under the Convention must be effected according to the gold value of the French franc on the open gold market. She requests that the sum of 9,517 Lebanese pounds, the amount of which is not contested, be evaluated in francs on the date of the loss of her luggage, 8/26/1976, and be awarded to her in its entirety, since the limit provided for in article 22 was not reached.

Furthermore, she asks for incidental damages: a trip from Valence to Paris imposed by EGYPTAIR for 700 francs for the purpose of discussing her claim, 3,000 francs in damages for the prejudicial attitude of the carrier during a three-year period, and 8,000 francs pursuant to article 700 of the new Code of Civil Procedure.

The Attorney General has presented his observations. He has examined the legal problem put before the Court

by successively rejecting different methods for the calculation of damages because of the elimination of any reference to gold for the convertibility of the various national currencies, and specifically because of the non-appearance of the parity of the French franc with a certain quantity of gold and of the determination of an official rate for gold different from its price on the open market. He therefore eliminated: (1) the reinstitution of the old system of conversion by reference to the official price of gold in its definition of the French franc after the devaluation of 1969; (2) reference to gold on the open market; (3) the application of a substitute index; (4) the calculation of a ceiling with reference to a foreign currency, such as the US dollar. He proposed to the Court that it confine itself to the rules of general law in matters of determining damages and to avoid the extravagant consequences which would result from the application of the open market price of gold to the limitation of liability of the air carrier, a standard subject to speculation.

THIS HAVING BEEN SET FORTH:

Whereas, the Warsaw Convention of 10/12/1929 relating to international air transportation, modified by the Hague Protocol of 8/3/1963 makes the air carrier liable for damages sustained in the case of lost checked baggage when the event causing such loss occurs during air transportation;

That it is an established fact that the luggage checked by Mrs. CHAMIE with a total weight of 50 kilograms comprised of three suitcases was lost on flight No. 923 of 8/26/1976 on an EGYPTAIR aircraft between Damascus

and Paris, via Cairo, and that there was no declaration of value;

Whereas article 22 of the Warsaw Convention provides that, in the transportation of checked baggage, the liability of the carrier shall be limited to a sum of 250 francs per kilogram, barring a special declaration of the value at delivery . . . that in the case of loss . . . only the total weight of the lost item(s) of baggage is taken into consideration to determine the limit of liability of the carrier, . . . that the fixed limits do not have the effect of removing from the Court the right also to award, in conformity with the law, a sum which corresponds to all or part of the expenses and other fees of the proceedings as shall be shown by plaintiff . . . ;

That paragraph 5 of article 22 specifies: "The sums stated in francs in this article shall be deemed to refer to a currency unit consisting of sixty-five and a half milligrams of gold of millesimal fineness nine hundred. These sums may be converted into national currencies in round figures. Conversion of these sums into national currencies other than gold shall, in case of judicial proceedings, be made according to the gold value of such currencies at the date of the judgment;"

Whereas this text defines a unit of account in which the rate, clearly established with reference to a quantity of gold, gives it the nature of a universal unit of constant value which must serve as a reference at an identical level in all the signatory countries;

That the conversion of fixed sums in monetary units of account into national currencies which must be effected, in the case of judicial proceedings and barring a gold cur-

rency, "according to the gold value of such currencies at the date of the judgment," which date was added to paragraph 5 of article 22 by the Hague Protocol of 8/3/1963, must necessarily take into account the change in national currencies in terms of worldwide inflation;

That in 1929, the conversion of Warsaw francs was effected in parity with the Franc Poincare which was also defined as 65.5 milligrams of gold at a standard of 900/1000 degrees of fineness;

That following the successive devaluations of the French franc and the change from the old franc to the new franc dating from 1/1/1960, the French governmental declaration of 8/10/1969 defined for the last time the new parity of the franc in relation to gold at 0.368 milligrams, which made it possible to present before a French judge a conversion of 92.20 francs for 250 Warsaw monetary units per kilogram of checked baggage;

Whereas, at the time of the drafting of the Guatemala Protocol of March 8, 1971, relative to air transportation, it was clearly agreed that the new ceiling on the carrier's liability would be fixed in monetary units of Poincare francs according to the official gold parity and not according to the value of the metal on the open market; that such was also the case with respect to the drafting of other international conventions on transportation;

That following the Smithsonian Institute agreement of 12/18/1971, the International Monetary Fund, in decision No. 3963, created, for certain of its members which did not want the system of official parities, new rates, called central rates, relating to gold by a different method than that foreseen by the agreements of BRETON

WOODS, at \$35 US an ounce of fine gold following the cessation of the convertibility into gold of US dollars; these central rates were not applied in France where the currency had been on an official parity with gold since 1969;

That at the Montreal Conference on Aeronautics Law of September 1975, the national representatives envisaged the substitution of special drawing rights (S.D.R.) for the Franc Poincare, but could not arrive at a general agreement on the definition of a universal unit of constant value which would serve as a reference for the expression of monetary sums in international conventions, even though the Legal Committee of the I.C.A.O. had published in October 1974 a resolution relative to the conversion of the Franc Poincare into national currency in the Warsaw and Rome Conventions, eliminating the necessity of taking into account the price of gold on the free market;

That it follows that the monetary unit of reference of the Warsaw franc equal to the Franc Poincare of 1929 was maintained in article 22 while the conversion of this unit of account was effected according to the gold value of the franc resulting from the devaluation of 1969;

Whereas the Jamaica agreements, which France signed, eliminated as of April 1, 1978 all reference to gold for the determination of the official value of national currencies and, therefore, for the present French franc;

That it is therefore necessary to note that since this date, and specifically on October 6, 1978, the date of the judgment, the conversion of the units of account referred to at the end of article 22(5) according to the gold value of the French franc has become impossible;

Whereas, the Court may not arbitrarily extend beyond the 1st of April 1978 the official parity of the franc with the quantity of gold defined in 1969, since this definition has been eliminated by international agreements;

That the Court also may not refer to the variation of a price index in order to determine the gold value of the franc at the date of the judgment without causing this value to vary according to the subjective choice of this index;

Whereas, if it is true that the tickets issued by the airline companies, and in particular by EGYPTAIR, contain a clause limiting the liability of the carrier for loss of checked baggage to \$20 (US) per kilogram during international trips; and that settlements occur on this basis between companies and passengers suffering these losses, such a clause, contrary to the Warsaw Convention, is illegal by reason of substituting for the system of calculation of article 22 of limited liability determined by reference to a foreign currency not convertible into gold, unilaterally chosen by the carriers;

Whereas, the freedom of the gold market, especially since 1968, having left to private parties the determination of the price of this metal according to the fluctuation of supply and demand within each state, tied to the gold pool, has determined a gold value different from its official parity in relation to national currencies, which value varies according to the place, the time, the economic or political circumstances, or mere speculation;

That the price of gold on the free market cannot be a standard of reference for the convertibility into national currencies of Warsaw Convention units of account, since

the contracting parties desired that the conversion be effected according to the gold value of currencies officially defined by each member country, which was allowed in particular for the USSR, a signatory to the Convention, and not according to the price of the precious metal on the various national markets; that this was in fact the holding of the French courts up to April 1978 on the question of limitation of liability of international air carriers which determined the gold value of the French franc according to the definition resulting from the 1969 devaluation at 0.368 grams of pure gold with 900/1000 degrees of purity, corresponding to 92.20 francs per kilogram for 250 Warsaw units;

Whereas, the disappearance of the official parity of the franc with a quantity of gold following the Jamaica agreements has made it impossible since April 1978 to use, for the conversion of the monetary unit of account of Warsaw, the reference to the value of gold on the open market of the Paris Stock Exchange, which has no official role in the international monetary system and does not correspond to an official price defined by the French government and is merely the result of transactions of a private nature on a non-competitive market, tied to speculation in the precious metal, without any reference to the French currency which is solely recognized on the international level;

That while since April 1978, the Bank of France has revalued its inventory of gold, this revaluation accomplished according to its own particular criteria (6.5 per semester, it seems) would not be taken into account in determining the gold value of the present officially unconvertible French franc;

That the Tribunal therefore erred in considering that the conversion or the Warsaw units of account should be effected according to the international value of bullion on the Paris Market on 10/6/1978;

Whereas, the court could not refuse to render a decision under the pretext of silence, obscurity, or insufficiency of the law;

Whereas, to make an evaluation of damages according to the rules of French general national law in view of the evidence presented in the case in point, namely a simple declaration of a list of lost objects contained in three suitcases and evaluated by the plaintiff, would be contrary to the rule stated by the Warsaw Convention, which in article 22 determined the limit of liability of the air carrier according to rules based upon the total weight of the lost baggage, and to the value per kilogram of the lost baggage, at 250 francs per kilogram, Warsaw francs, being equal to the Franc Poincare of 1929;

That, as the global limit could not be exceeded except in the case of a special declaration of value made at the time the baggage was checked, the evaluation under general law may well exceed this limit;

Whereas, the Court was obliged to take note of the fact that since April 1, 1978, the disappearance of the official parity of the franc with gold results in the impossibility of applying the rule of the conversion of the units of account into French national currency, for which there no longer exists an official gold value;

That since the conversion rule of article 22 constitutes a veritable gold clause, changing according to worldwide

inflation and successive official devaluations of national currencies of the Member States of the Convention, it therefore becomes inapplicable, in the international air transport contract, just as the gold clause has disappeared in contracts under national law, for reasons crucial to the defense of the national currency;

That consequently, the present French franc, successor to the Franc Poincare of 1926, with a gold weight identical to that of the Warsaw franc unit of account, successor to the old franc, and successor to the new franc after 1/1/1960, defined by a gold weight after the devaluation of 1969, having lost since April 1978 all reference to a gold value and being recognized as a currency of payment for international obligations, can alone be used for conversion into national currency of the Warsaw Convention francs, and must be recognized as having a value equal to the French franc of 1926 on the international level, but without a reference to gold;

That the loss of a kilogram of baggage must therefore be redressed by a global indemnity equal to 250 current French francs for 250 francs, Warsaw units;

That, therefore, the limit of liability of EGYPTAIR for the 50 kilograms of lost baggage established as of the day of the judgment of 10/6/1978 is the sum of 12,500 francs;

Whereas, Mr. [sic] CHAMIE has no basis on which to demand of a French court a judgment against the air carrier for the payment of the equivalent in French francs of 9,517 Lebanese pounds on 8/26/1976, the date of the loss, but only for the value of her baggage in French national currency on the date of the judgment;

That according to the official rate of exchange in October 1978 the Lebanese pound was worth 1.347 francs and the claim must be evaluated at 12,829.39 francs, a sum exceeding the limit of liability;

That the amount of the indemnity for lost baggage must therefore be determined at 12,500 francs to be paid by EGYPTAIR with interest at the legal rate from the date of the summons and complaint 2/28/1978;

Whereas, on the claim for incidental damages, article 22 of the Warsaw Convention is exclusive of all other indemnities, with the exception of the costs of the trial;

Furthermore, no proof was given as to the existence either of a direct and certain connection between the voyage from Valence to Paris and the loss of the luggage in this case, nor as to bad faith on the part of EGYPTAIR in conduct of the negotiations to settle the difficulties arising from the baggage loss and the interpretation of article 22 of the Warsaw Convention;

That the delay in the payment is redressed by the granting of legal interest;

That it follows that the judgment which upheld the claim for damages should be reversed, and the cross appeal dismissed on this point;

Whereas, applying the provisions of Article 700 of the new Code of Civil Procedure, it is equitable to grant, in this regard, to Mrs. CHAMIE, a Lebanese refugee who lost her baggage and was obliged to sue and bring an appeal in order to obtain indemnification for the damage sustained, the sum of 3,000 francs for all fees connected with the proceedings which are not included in the costs;

Whereas the expenses in the first instance and of the appeal must be borne by EGYPTAIR whose argument was rejected and whose offer of 4,900 francs was not satisfactory;

ON THESE GROUNDS, THE COURT

Admits the appeal of the EGYPTAIR Co. and the cross appeal of Lucie CHAMIE nee JAVALIAN;

REVERSES the judgment appealed and, redeciding the case,

Orders EGYPTAIR to pay Mrs. CHAMIE:

1°/ for loss of 50 kg of checked baggage the sum of 12,500 frs. with interest at the legal rate from 2/28/1978;

2°/ on the basis of article 700 of the new Code of Civil Procedure the sum of 3,000 frs.

Rejects all broader or contrary demands by the parties.

Directs EGYPTAIR to pay the costs of the first instance and appeal.

SCP GAULTIER, solicitors, may recover directly the expenses of the appeal for which it made an advance without having received a deposit.

(illegible)

FOR TRUE AND AUTHENTIC COPY

The Clerk of the Court,
(Signature)

JA158

CERTIFICATION

I, Irwin K. Styles, of ALL-LANGUAGE SERVICES, INC., 545 Fifth Avenue, New York, New York 10017, hereby certify that the foregoing is a true and faithful translation of the original document.

/s/ Irwin K. Stiles

(Jurat dated July 28, 1981 omitted in printing)

EXHIBIT A—EXCERPT FROM WARSAW
CONVENTION CONFERENCE MINUTES
ANNEXED TO AFFIDAVIT OF JOHN R. FOSTER

SECOND
INTERNATIONAL CONFERENCE
ON
PRIVATE AERONAUTICAL LAW

October 4-12, 1929

Warsaw

MINUTES

Translated by: Robert C. Horner, Dartmouth College A. B.; Faculte des Lettres, Strasbourg, France; New York University School of Law J. D.; Member, New York Bar.

Didier Legrez, Licencie es Lettres; Diploce d'etudes superieures de droit prive; Avocat a la Cour d'Appel de Paris.

states.

(Result of vote: FOR—19 votes, AGAINST—4 votes. ABSTENTIONS—2. STATES VOTING FOR: Germany, Austria, Belgium, Brazil, Denmark, Spain, Estonia, France, Greece, Italy, Japan, Luxembourg, Mexico, Netherlands, Poland, Switzerland, Czechoslovakia, Yugoslavia. STATES VOTING AGAINST: Egypt, Great Britain,

Union of South Africa, Australia. ABSTENTIONS: Norway, USSR.)

THE PRESIDENT: The French proposal is thus accepted by 19 votes against 4, and two abstentions.

We pass now to the third heading: Limits of Liability.

We are presented with a French amendment: reduction of the figure for goods. (Article 23, paragraph 2).

The amendment of the French Delegation is conceived thus: "the liability of the carrier shall be limited to the sum of 125,000 francs per traveler . . .".

Moreover, it is proposed to eliminate from paragraph 4 of the same article the sentence: "the values hereabove are gold values".

I give the floor to the Reporter.

MR. De VOS, Reporter: We reach the third subject, which concerns the limitation of liability, from another angle.

The French proposal consists in reducing the limit of liability for goods. Moreover, the French proposal consists in modifying, for passengers, the liability of the carrier, in converting the sum of 25,000 gold francs into the value of present French currency, that is to say, 125,000 francs. This proposal is the consequence of the stabilization of French currency which occurred since the text was prepared.

The same modification leads quite naturally to the elimination of the sentence "the values hereabove are gold values".

The consequence for goods, is that in maintaining the sum of 100 francs per kilo, which become 100 stabilized

French francs, one reduces the maximum value of the liability for goods.

The same observation has been made in my country and, as much as Reporter as Delegate of Belgium, I support this French proposal. I remind you that it consists in taking for goods, as limited liability, 100 French francs per kilo and for travelers 125,000 French francs.

MR. RIPERT (France): I do not have much to add to that which the Reporter has just said.

The requested modification is one of pure form. The text was drawn up before the French stabilization. It has been added: The above values are gold values.

As there is a new definition of the French franc, in order that the text be correct one must take the French franc, which is the gold franc, and multiply it by 5. It's a simple question of wording. This is for passengers.

But for goods, the air carriers have pointed out to us that the figure of 100 gold francs per kilo, previously fixed, that is to say, 500 French francs, was too high a figure in comparison to the average value of tonnage carried.

Here is the practical indication furnished by the air carriers. They say: There's a very clear way of fixing the average value of tonnage carried; the consignors having declared the value of the shipments, one need only divide the declared value by the tonnage carried. They specify: for example, in 1928 we carried 392,000 kilos and as declared value we had 50 million, this gives around 130 francs per kilo.

The value per kilogram would thus not exceed on the average 130 francs.

When we fixed the limit of liability, we took a figure which we considered as representing the average value of goods carried, that is 500 francs per kilo. This figure of 500 francs being too high, we propose to you to reduce it. The figure of 100 francs would be perhaps a little low, but one could take, for example, 150 francs or 200 francs, in choosing the figure which would be suggested to us by practical considerations.

MR. RICHTER (Germany): For Germany I believe that the reduction proposed by the French Delegation to 20 gold francs is excessive, but we could accept, following your suggestion, the sum of 250 French francs.

MR. PITTARD (Switzerland): I am not all all opposed to an actual estimate as regards liability for passengers and for goods, but the Swiss Delegation submitted a text which corresponds to that of the International Railroad Convention for the calculation of values.

Naturally, when we prepared our text, the French franc was variable, it has been stabilized since. But the fact that a currency has been stabilized does not imply that it is a final thing; a law can always modify another law. For this reason, in Switzerland, we have preferred to stick to the gold standard, which is the same in all countries, since there is but one quality of gold.

We would not be opposed to refer to the French franc, but to the gold French franc, that is to say, based on a weight of gold at such and such one thousandth.

Naturally, one can say "French franc" but the French franc, it's your national law which determines it, and one need have only a modification of the national law to overturn the essence of this provision. We must base ourselves on an international value, and we have taken the dollar. Let one take the gold French franc, it's all the same to me, but let's take a gold value. I refer to the drafting committee to find a formula, but I would like the conference to be consulted on the opportunity to take a gold value as a basis of calculation, be it American or French.

Our proposal is the following, except for wording:

The sums indicated hereabove shall be considered as corresponding to the gold franc worth $1/5.18$ gold dollars of the United States of America. They must be converted in each national currency in round figures.

MR. RIPERT (France): The amendment of the Swiss Delegation cannot be applied here, because the definition of the gold franc, that it gives $1/5.18$ gold dollars of the United States of America, is the definition of the former gold franc and not of the new gold franc. If this Convention of air law is to be applied during one or two centuries, I would perhaps share the fears of Mr. Pittard, but it's a question of a stabilization which was done in practically every country, for a Convention which is drawn for a few years, and I believe that when you will have fixed the present French franc, you will add nothing in saying "gold franc". What fear can you have? It is evident that the definition will correspond to the present franc.

MR. CLARKE (Great Britain): And if you have a new revaluation?

MR. RIPERT (France): The Convention applies to the present franc. There is a definition of the French franc in the French statutes of 1928; when we have put in the Convention: 250 French francs such as they are defined at the time the Convention comes into force, everything will be set. It's a question of wording.

THE PRESIDENT: Then, Sirs, if you have no opposition, we are going to proceed to a vote on the French proposals amended by the German Delegation.

MR. RIPERT (France): We ally ourselves with this last proposal.

MR. GIANNINI (Italy): There is first of all the question of principle: We must know if we are applying the principle of the French Delegation. Then there is the question of the French franc.

MR. PRESIDENT: That's true. Then, we are going to pass to a vote on the question of substance, that is, whether we accept the French formula or the Swiss formula.

MR. PITTARD (Switzerland): We have no objection to taking the French franc as a base, but what I stand against, is the fact of referring to a French law of 1928; insert in our international convention the same formula as that which you have in France and we accept it.

MR. RIPERT (France): Then, we shall insert "French franc corresponding to such and such a weight of gold".

MR. PITTARD (Switzerland): We agree.

MR. PRESIDENT: Sirs, the vote is open. The vote by states is not demanded.

I am going to ask the conference to come out in favor of the French formula, that is to say, the definition of value of French francs corresponding to a given weight of gold.

(Result of vote: FOR—18 votes, AGAINST—1 vote. STATES VOTING AGAINST: Italy.)

THE PRESIDENT: We pass to the second question, the question of the sum which would be fixed at 250 francs per kilo (for goods).

MR. GIANNINI (Italy): I don't know if I understood well, but I understood that we had voted for a definition of the franc, and not to know if we were accepting the reduction of the limited liability for goods. Now, we are going to vote on the principle of reduction, without fixing the exact figure?

THE PRESIDENT: We pass at the same time on the figure. The proposal consists, in sum, in reducing the ceiling figure of 100 gold francs to 50 gold francs.

MR. SUDRE, Secretary General: You have just indicated that you would accept the value of the present stabilized French franc for its gold value; this represents, not the 100 francs per kilo indicated by Article 23, but 500 francs, and you are presently presented with a proposal for reduction by the French Delegation, supported by the German Delegation, which suggests fixing the figure indicated in Article 23, paragraph 2, at 250 francs

per kilo, in French francs, such as you have just defined them.

THE PRESIDENT: No one demands the floor! . . . Then, we pass to a vote. The balloting is open. A vote by states was asked.

(Result of vote: The French proposal is adopted unanimously but for 2 abstentions, those of Japan and the USSR.)

THE PRESIDENT: Sirs, we pass to the fourth heading: The Liability Action. We begin by the letter (a).

EXHIBIT B—FOREIGN DECISION OF
ZAKOUPOLOS V. OLYMPIC AIRWAYS CORP.
ANNEXED TO AFFIDAVIT OF JOHN R. FOSTER

TRANSLATION

Athens Court of Appeal

No 256/1974

President: Con. Mermingas

Introducing Judge: Con. Sakellariades

Whereas in their action, whereon the appealed judgment was issued, as such action was acceptably clarified by the first instance written pleadings, the plaintiffs and now appellees have stated that pursuant to an agreement of air transport, made the 22nd December 1971 in Western Germany with the defendant Olympic Airways, they delivered to it for transportation, by aircraft of its, from

western Germany to Athens, their luggage mentioned therein and that, due to the negligence of the defendant and its agents, workmen and employees a suitcase of theirs was lost during the transportation, weighing twenty kilograms, such loss having been declared on the same date to the defendant. On the grounds of such facts they requested that the defendant be obligated to pay them as compensation the sum of drachmas 30.696, corresponding to the value of the articles contained in their suitcase, which was lost due to its fault, mentioned in the action in detail. The court which judged at the first instance, applying the Warsaw Convention, ratified by Emergency Law 596/1937 accepted the action in part and adjudicated to the plaintiffs the sum of 18.970 drachmas.

Whereas in paragraph 2 of article 22 of the Warsaw Convention ratified by E. L. 596/1937, as same was amended by Legislative Decree 4376/1964, it is provided that "in the transportation of checked luggage and of goods the liability of the air-carrier is limited to the sum of 250 francs per kilogram". And in paragraph 5 of the same article is provided that: "The sums provided in this article are considered to refer to a monetary unit weighing sixty-five and a half milligrams of gold of nine hundred thousandths fineness. These sums may converted into national currencies, the fractions being omitted the conversion of such sums into national currencies, except the golden ones, will be made in case of court proceedings, pursuant to the value of such currencies in gold on the date of issuance of the judgment." As basis for the conversion of the above francs into drachmas is taken the value of gold, which, as it is known has two values.

One that is steady and irrevocable and which is determined internationally and in Greece in a certain quantity of United States of America dollars per ounce of pure gold, and one that its current value in drachmas and which is determined formally in the Athens Stock Exchange, according to article 1 para. 2 of E. L. 944/1946, under which "the purchase and sale of gold and golden coins is permitted in the Athens Exchange." Between those two values said E. L. 596/1937, as amended, accepts the current value thereof, because pursuant to the above article 22 para. 5 of the Warsaw Convention, in case of court proceedings the value of gold on the date of issuance of the adjudicating judgment will be taken into account. Consequently the law clearly accepts as basis for the conversion of the said francs into drachmas the current and market value of gold in the Athens Stock Exchange from time to time prevailing, because otherwise, if the steady thereof was taken into account, the occasion of a different calculation of the gold's price on the date of the judgment's issuance would never arise since gold's value would be steady and unchanged. Finally according to article 917 of Code of Civil Procedure, whenever the consideration consists of replaceable commodities for enforcement reasons their value in money must be determined. The determination of consideration's value is made by a judgment of the one member first instance, following the procedure of articles 670 to 676. In view, therefore of all the above, as well as of the fact that the suitcase belonging to the plaintiffs-appellees which was lost at the transportation from Dusseldorf, western Germany to Athens, by a aircraft of the defendant-appellant, was weighing, under the facts mutually accepted, of

twenty kilograms, and in the basis of such weight the defendant is obliged to pay to the plaintiffs five thousand (5.000) of the above monetary unit (francs), the value thereof being calculated at the time of the first hearing of the action under consideration at the first instance (5 October 1972), as such parity was taken into consideration from the time point of view by the appealed judgment as well and not at the time of issuance hereof, since the Court of Appeal may not issue a more harmful judgment for the appellant without the submission of an appeal or a counter-appeal by the appellees-defendant (art. 536 para. 1 Code of Civil Procedure), and the place of the appellant is in this case rendered more harmful by such at a later time determination of gold's value, it being an evident to all fact that as from the above date (5 Oct. 1972) and thereafter has substantially increased the current value of gold, which, as aforesaid, is the basis of determination of the franc's price. Such calculation will be made on the basis of the current price of gold prevailing in the Athens Stock Exchange on the above date. Consequently the appealed judgment correctly accepted that the value of francs should be calculated at the current and market value of gold, but wrongly and by an erroneous interpretation of law condemned the defendant-appellant to pay drachmas, and therefore such judgment must be in fact rescinded and the appeal under consideration must in this part only be accepted, so that, the action under consideration being judged a new by the Court of Appeal and being accepted in part, the defendant-appellant should be obligated to pay to the plaintiffs the equivalent in drachmas of the above amount of francs at the time aforesaid (5 Oct. 1972).

THEREFORE

It obliges the defendant-appellant, for the case set part in the action and the reasoning hereof to pay proportionately to the plaintiffs the equivalent in drachmas of five thousand francs (5.000) at the time of the first hearing of the case at the first instance (5 October 1972), in accordance with the calculation set part in the reasoning, with the lawful interest as from the service of the action till payment in full.

EXHIBIT C—FOREIGN DECISION OF *FLORENCIA, CIA. ARGENTINA DE SEGUROS S.A. V. VARIG S.A.*
ANNEXED TO AFFIDAVIT OF JOHN R. FOSTER

CERTIFICATE OF ACCURACY

TRANSLATION

From Spanish into English

STATE OF NEW YORK
COUNTY OF NEW YORK

S.S.:

On this day personally appeared before me Wm. Bertsche, J.D., Ch.E., A.C.S. who, after being duly sworn, deposes and states:

That he is a translator of the Spanish and English languages by profession and as such connected with the LAWYERS' & MERCHANTS' TRANSLATION BUREAU;

That he is thoroughly conversant with these languages and is duly accredited by examination as translator

of said foreign language by the American Translators Association.

That he has carefully made the attached translation (on the official paper of the LAWYERS' & MERCHANTS' TRANSLATION BUREAU) from the original document written in the Spanish language; and

That the attached translation is a true and correct English version of such original, to the best of his knowledge and belief.

/s/ (Illegible)

(Jurat dated April 28, 1981 omitted in printing)

In Buenos Aires, capital of the Argentine Republic, on this 27th day of August 1976 there met, by agreement, the judges of Part 2 for Civil and Commercial Matters of the National Court of Appeals in Federal and Administrative Contentious Matters to take cognizance of the appeal filed in the action of "Florencia Cia. Argentina de Seguros v. Varig S.A." for collection of money, from its judgment appearing on page 107, the Lower Court having submitted the following question for decision:

Is the decision appealed from in accordance with the law?

The drawing of lots having been effected, it turned out that the voting was to be effected in the following order: Justices Guillermo R. Quintana Teran and Eduardo Vocos Conesa.

With regard to the question submitted, Judge *Dr. Guillermo Quintana Teran* stated:

I. The air carrier having admitted its liability for the loss of a package of 32 kilograms containing six Hi-

tachi transistor conductors which was to travel on flight RG-315/31 from Tokyo to Buenos Aires, the discussion is centered specifically on the amount of the claim, since the plaintiff considers the manner of calculating the limit of liability stipulated in Article 22 of the Warsaw Convention of 1929 erroneous. The court, on the other hand, held that the calculations effected by the defendant were correct, for which reason it limited the judgment to the amount already deposited by it and exempted it from the payment of interest and costs.

The plaintiff has appealed from said decision, its grounds of appeal being set forth in the brief appearing on pages 121/123, the answer to which appears on pages 125/127.

II. Article 22 of the Warsaw Convention limits the liability of the carrier of baggage and goods to 250 "Poincare" francs per kilogram. The "Poincare" franc is a theoretical currency of 65.5 mg gold of 900 thousandths fine, which represents 0.5895 grams fine gold (in accordance with report appearing on pages 37, 88, 69 and 92/3). In order to determine its value one starts from the quotation of the Troy ounce (which is equivalent to 31.10348074 grams of fine gold), which was stable for a long time (see A. J. Mendelsohn, *The Value of the Poincare Gold Franc in Limitation of Liability Conventions*, in "Journal of Maritime Law and Commerce" Vol. 5, No. 1, pages 125/128). Today, however, it is based on the value established by the Federal Reserve Bank of the United States (US\$ 42.22 (see report on page 87) or the parity with the SDR (Special Drawing Right). Article XXC, Section 2 of the Agreement Establishing the International Monetary Fund determines that 0.888 671 g of fine gold

is equivalent to 1 SDR = 20188 dollars, namely that the Troy ounce of fine gold represented US\$ 42.0658. With respect to all of this, see report of the Central Bank appearing on page 90, there is a free gold quotation market, there being contained in the records, various circumstances concerning the quotation of the gold, there being contained in the records various certificates concerning the quotation thereof on the markets of London, Paris and Zurich (see pages 48, 52, 56, 60, 68 and 70). (sic)

What is involved then is to define whether the value of the Poincare franc is to be established as a function of the quotation established in the United States of America in order to stabilize the international exchange parities or as a function of the true value of gold, established on the free exchange markets by the law of supply and demand (see report on page 52).

This constitutes—with respect at least to the national decided cases—a novel question. The Warsaw Convention does not expressly define the point; it appears to us proper to interpret it in the manner that the limit of liability established seeks to approximate as accurately as possible the true value of gold (see P. P. Heller, "The Warsaw Convention and the Two Tier Gold Market," cited by A. I. Mendelsohn). This manner of looking at the problem appears particularly suitable if it is borne in mind that the international legislature desired to have reference to an ideal currency which is defined only by its metallic content, which, in view of its intrinsic character—gold—, permanently retains its value.

By way of corroboration it may be recalled that when different rates of exchange have existed—as is the case

on the commercial and financial markets—the decided cases have tended towards what reflects with greater reality and/or veracity the parity of our currency with the foreign exchanges (cf. Cam. Civ. Cap., Sala A, J.A., volume 15, year 1972, page 207; Sala A., J.A., volume 17, year 1973, page 48; Cam. Com. Cap., Sala C, J.A., volume 19, year 1973, page 358, etc.).

I do not believe that in order to alter the sense of this decision it is possible to invoke the existence of contrary uses and customs since the reports on pages 87/89 which come from companies directly involved in the matter do not demonstrate their validity with the characteristics required by the legal writers (see Llambias, "Tratado de Derecho Civil" (Treatise on Civil Law), General Part, 4th edition, volume I, pages 68/69, No. 65/66; Borda, "Tratado de Derecho Civil argentino" (Treatise on Argentine Civil Law), General Part, 5th edition, volume I, pages 70/71, No. 54), the airline companies limiting themselves to submitting those which are in accord with the view most favorable to their own interests.

Finally, I wish to point out that the Central Bank of the Argentine Republic, when calculating the value of the Argentine gold in its report appearing on page 61 of the records, employed the estimate of the Troy ounce on the free market and not the "official" quotation.

There still must be defined the date which must be taken into account for the purposes of effecting the conversion of the Poincare francs. I believe that such date must be the date of the breach of the transportation contract—since the carrier's obligation to indemnify arises at that moment—which, in the present case coincides with

the date of arrival in Buenos Aires of flight H6-5A5/31 of Varig to Buenos Aires without the cargo covered by air waybill 042-14116933.

The plaintiff having proven the payment to the consignee of the merchandise of Pesos 30,000 (see report appearing on page 4 of the records and acknowledgement at the end of page 37 of the records) and there being no question concerning the value thereof and the liability of the carrier—the questions which the defendant submits being related to the limit of liability—I believe that the complaint must be granted in its entirety, including that part thereof relating to the calculation of the monetary depreciation, but with the condition that its amount does not exceed the limit of 250 Poincare francs per kilogram of weight stipulated in Article 22 of the Warsaw Convention, which is to be calculated duly in accordance with the rules which have just been set forth.

This court has repeatedly admitted in the field of civil liability for breach of contract, inclusion of monetary depreciation, even in cases in which the action was brought by an insurance company subrogated in the rights of the injured party. Under this last aspect it is true that the court, as from action 3397 decided on November 20, 1974, has, with my single dissent, which it upheld in that case and in many others changed its previous holding, inclining to the opinion which denied this right to the insurance companies; however, in its present integration it has returned to its original opinion (see actions 4415 of July 20, 1976, and 4377 of July 23, 1976).

Taking into account the time which has elapsed since the payment contained on page 4 was made, the plaintiff

lacks the right to obtain updating for prior periods since it does not appear that it itself paid this "plus" to the injured party (see decision of this court in action No. 1576 handed down on November 23, 1979), the variable course shown during this period of time by the phenomenon of the loss of the exchange value of our currency, and the circumstance that the amount ordered to be paid will bear interest at a reduced rate from the date of this pronouncement, I believe that the amount ordered for payment must be increased to the amount of 168,000 pesos.

(Omission)

Revista de Estudios Maritimos, January-May 1977, p. 85.

JA176

**EXHIBIT D--FOREIGN DECISION OF
BALKAN BULGARIAN AIR LINES V. TAMMARO
ANNEXED TO AFFIDAVIT OF JOHN R. FOSTER**

I, Federico Garcia-Almendros, Managing Director of Expression Translations Limited, 188/9 Drury Lane, London WC2, hereby declare that the enclosed translation into the English language is a true and faithful rendering of the Italian original documents likewise hereonto attached.

11th June 1981

EXPRESSION TRANSLATIONS LIMITED

/s/ F. Garcia

(Managing Director)

ITALIAN JURISPRUDENCE

Balkan Bulgarian Airlines v. Tammaro

Court of Milan 25.10.1976

COURT OF MILAN 25 OCTOBER 1976

Orazi, Pres.—D'Agostino, Reporting Judge

BALKAN BULGARIAN AIRLINES v. TAMMARO

Transport—air transport—transport of persons and baggage—Warsaw Convention 1929—field of application—its autonomy in relation to the Shipping Code and Civil Code.

Transport—air transport—limitation of debt—exclusion for fraud or serious fault on part of carrier.

Transport—air transport—compensation for damage—criteria for conversion into national currency of the sum in Poincare francs.

At the end of the Milan-Frankfurt-Sofia flight effected by the Balkan Bulgarian Airlines on 14th August 1971, a

passenger had not obtained redelivery of the baggage and only subsequently obtained possession of one of the two cases. The passenger then summoned the Airline before the Courts of Milan, claiming compensation for the damages set at the figure of 283,000 Lire.

By a judgment dated 26th July 1973, the Honorary Magistrate accepted the claim for complete compensation, not recognizing the right of the Defendant to the benefit of limitation of the debt.

The uniform international regulations of the Warsaw Convention of 12th October 1929 (modified by the Hague Protocol of 28th September 1955) is completely autonomous and self-sufficient in relation to the evaluations contained on similar matters in the rules of the *lex fori*. Since it was a matter of international air transport, no reference should therefore be made to the provisions of the Navigation Code and the Civil Code (1).

The limitation of the debt to 250 Poincare gold francs per kilogramme provided for in Article 22 sub-section 2 of the Convention is excluded only where the passenger proves that the loss of the baggage is due to fraud or serious fault on the part of the carrier (2).

The conversion into national currency of the sum in Poincare gold francs (1 gold franc = 655 milligrammes of gold at 900/1000) to be made—in pursuance of the convention—in accordance with the gold value of the currency at the date of decision, must be effected with reference to the quotation of gold on the principal European markets (London and Zurich) (3).

Since, in fact, the objective responsibility of the carrier (and which the carrier invokes) has been established—as

mentioned above—is 250 francs per kilogramme, and since the currency unit of account is assimilated by Article 22, sub-section 5 of the said Convention to 65 milligrammes and a half of gold at a purity of 9 thousandths fine (i. e. Poincare francs) it follows that 250 of the said francs are equivalent to 16.375 grammes of gold at 900/000 and that in turn, these are equivalent to 14.7375 grammes of gold at 1000/000 ($16.375 - 1/10 = 14.7375$).

The subsequent conversion of the sum indicated into national currency is then effected, again in accordance with Article 22 sub-section 5 of the said Convention, on the basis of the gold value of the currency at the date of the decision.

Therefore, in order to carry out the calculation in question, the Court deems that it should make reference to the quotation of gold on the principal European markets (London and Zurich) which quotation at today's date of discussion proves to have been fixed at an average of US Dollars 127.50 per troy ounce.

Bearing in mind the fact that the troy ounce is a measure equivalent to 31.1035 grammes, 14.7375 grammes therefore amount to US Dollars 60.41.

At that point, considering that today's rate of exchange for the dollar (UIC average) is 879.95 lire, and considering furthermore that the weight of the case lost must be presumed—failing more precise indications in the records of the case in relation to the overall weight of 20 kilogrammes of the 2 baggages belonging to Tammaro—to be 10 kilogrammes, it is quite clear that the amount in lire from the indemnity due to the respondents in appeal, amply exceeds the sum which the first Judge ordered the

airline to pay and accordingly there is no concrete and actual interest on the part of the Appellant in the amendment of the Decision.

(Omissis)

EXHIBIT E—FOREIGN DECISION OF
KUWAIT AIRWAYS CORP. V. SANGHI
ANNEXED TO AFFIDAVIT OF JOHN R. FOSTER
TITLE SHEET FOR JUDGMENTS IN APPEALS
IN THE COURT OF THE PRINCIPAL
CIVIL JUDGE
AT CIVIL STATION BANGALORE

present: Shri S. M. Byadgi, B. Com. LL.B.,
(Name of the Presiding Judge)

Date of Judgment: 11th day of August 1978.

Regular Appeal No. 54 of 1977

- Appellants: 1. Kuwait Airways Corporation,
having its Indian Office at 86, Veer
Nariman Road, Bombay-28
2. F. A. Moraes,
S/o Cyprian, Christian,
Officer, Kuwait Airways Corporation,
86, Veer Nariman Road, Bombay-28; and
86, Veer Nariman R.
3. S. E. I. Joseph Khouri,
General Manager,
Kuwait Airways Corporation,
86, Veer Nariman Road, Bombay-28

By Pleader Shri W. K. Sundara Murthy

Vs.

Respondent: Dr. Indra Sanghi,
Sanghi Associates,

JA180

400N, First Block, Rajajinagar, Bangalor
—560-010

By Pleader Shri

Date and nature of the decree or order appealed against—

Appeal against the judgment and decree
of the Principal Munsiff, Civil Station,
Bangalore in O. S., No. 525/73 dt. 22, 4.77.

Date of the Institution of the appeal: 29.6.1977

Duration of the Appeal	Year's	Month's	Day's
	1	1	12

REGULAR APPEAL NO. 54/1977

JUDGMENT

The only point that arises for consideration in this appeal is, what is the amount of damages to be paid to the respondent? The Respondent who was a bonafide traveller in the appellant Airways from Bombay to London on 29-10-1972 lost his luggage in the middle of his journey. His efforts to get back his luggage was futile in spite of his several correspondence. Thus, he claimed a damage of Rs. 2150/- and Rs. 100/-towards his expenditure in Franc. Besides he also claimed a damage of Rs. 2000/-on account of his physical suffering and mental torture. Thus, he claimed Rs. 7900.15 paise of damages. By way of amendment, he has claimed that the amount of Ps. 7900/- cannot be paid in terms of rupee then the said value may be paid in terms of gold.

2. The appellant-defendant raised several contentions by filing its written statement. They contended that the court below has no jurisdiction to entertain this suit. They denied their liability to pay the suit claim as claimed

by the Plaintiff. They contended that they were entitled to pay only damages to the extent of 10 kgs. and the value of its would be more or less than what is claimed by the plaintiff.

3. On the basis of these pleadings, the necessary issues were framed and the learned Munsiff after recording the oral evidence examining the various documents produced in the case found that it value of the articles that was lost by the plaintiff comes to Rs. 8783.55 paise as per the provisions of Warsaw Convention. He disallowed all other claims claimed by the plaintiff and according passed a decree for Rs. 8783.55 paise by a judgment dated 22.4.1977. Being aggrieved by the said judgment and decree, the defendant—Airways has come up with this appeal.

4. In support of this appeal, Sri Sundara Murthy, the learned Advocate for the appellant pressed only one point for consideration. He contended that Rule 22 (5) of the second schedule refers to conversion into national currencies according to Gold value of the currencies.

Hence, the Court below ought to have held that the conversion is to be made according to official value of the gold and not according to the fluctuating market rate. He further submitted that the Official value of the gold is to be fixed at part to the value of the gold that is fixed by the International Monetary Fund. So, he has given certain calculation as to how the said price is to be fixed and according to the said calculation he submitted that the price of the luggage that is lost by the respondent comes to only Rs. 1243.78 paise.

5. It is fairly conceded that the court below has jurisdiction to try this suit. It is also conceded that the respondent-appellant lost his luggage on his way to London by the negligence of the appellant Airways. It is also conceded that the respondent is entitled for compensation as per the Second Schedule of Warsaw Convention. It is further conceded that the respondent is entitled to get a compensation for a sum of 250 Franc per Kilogram as his luggage was registered. The appellant Airways also in their correspondence produced in the case have offered to pay the value of the said luggage. Rule 22 (5) of the Second Schedule clearly lays down as—

“The sums mentioned in France in this rule shall be deemed to refer to a currency unit consisting of Sixty-five and a half milligrammes of gold of millesimal finess nine hundred. These sums may be converted into national currencies in round figures. Conversion of the sums into national currencies other than gold shall, in case of judicial proceedings be made according to the gold value of such currencies at the date of the judgment.”

Thus, it is clear that the value of the luggage that is lost is to be paid according to the gold value in terms of rupees prevailing in our country. Similarly, Rule 22 (4) of First Schedule reads as follows:—

“The sums mentioned in this rule shall be deemed to refer to the French Franc consisting of sixty-five and half milligrams gold of millesimal fineness nine hundred.”

Thus it is clear that a Franc consists of sixty-five and half milligrams gold of millesimal fineness nine hundred. The learned Munsiff by taking into consideration the market value of the gold prevailing at the time of his

judgment at the rate of Rs. five ninety-six per 10 grams. has awarded a compensation at the rate of Rs. 8783.55 paise. He has taken the gold value as per the bullion price published in Deccan Herald dated 21.3.1977. Shri Sundara Murthy, the learned Advocate appearing for the appellant placed his reliance on a decision of the Supreme Court, reported in A.I.R. 1969 S. C. Page 1201, that a news item without any further proof is of no value and it is a second hand secondary evidence. It may be noted here that the item published in this paper produced at EM.P.26 it is not the news item published by the Deccan Herald itself. But it is a regular bullion price published under the authority of the bullion market. Therefore, one cannot believe that the principle laid down in the afore-said decision would be of any help to the appellant.

6. Shri Sundara Murthy next contended that the price of this gold cannot be taken into consideration at any rate as per the market value. But it will have to be considered in par with the gold value fixed by I.M.F. Unfortunately, there is absolutely nothing in this first or second schedule which is enumerated from Warsaw Convention, to say that the price of the luggage is to be fixed only at par value of the gold determined by I.M.F. However, Shri Sundara Murthy placed his reliance on the Exchange Control Manual published by the Reserve Bank of India. He particularly refers to Article 35 of this Manual. A perusal of the same clearly goes to show that it applies to the Contracts entered into by the Importers for purchase of goods from countries with which Government of India have concluded rupees payment agreement. Such an agreement may also contain a gold clause and the price specified in a contract is based on the current par

value of the Indian rupee as defined in Article IV (1) of the Articles of Agreement of I.M.F. i.e. one rupee = 0.118489 grams. So one cannot say that by plain reading of this Article it would apply to such case where the value of the luggage that is lost is to be fixed at the par value of the Gold rate fixed by I.M.F. It may be seen—that all these convention regulations were embodied in an Act shown as the Carriage by —Air Act 1972. The said Act—has enumerated the entire rules of the Convention—from Section 6 of the said Act. It is clear that a Franc mentioned in Rule 22 of the First or second schedule shall be for the purpose of any action against a carrier be converted into rupees at the rate of exchange prevailing on the date of which the amount of damages to be paid by the Carrier is ascertained by the Court. So, by this provision, the conversion is made quite easy and it clearly says that it is to be converted into rupee at the rate of exchange prevailing at the relevant time. If that is taken into consideration then the value of the luggage that is lost by the respondent comes to Rs. 10,000/- If in fact, the Government has an idea to fix the gold value on par with the gold value of I.M.F. then there would have been a provision for the same in the subsequent enactment of 1972. Hence, the Article that is relied by Sri Sundara Murthy in this Exchange Control Manual of 1971 would be of no assistance to him. Therefore, I find no substance in this contention.

7. It is next contended by Sri Sundara Murthy that the lower court has awarded damages more than what is needed by the Plaintiff. It is no doubt true that the Plaintiff in his complaint has claimed damages for the loss of his luggage to the extent of Rs. 2150/- S.F. he has not ex-

plained in his evidence what is the value of Rs. 2150/- S.F. But he has claimed Rs. 5844/- towards loss of the luggage. It is seen from various letters written by the appellant-corporation that he is entitled for 10 Kgs. equivalent to 250 gold Francs as stipulated in Article 22 of the said agreement and protocol provide Exs. P-9, P-12, P-14, P-20, P-22, P-24 and P-24. It may be noted that the respondent is expected to make a declaration before travelling about the contents of his luggage. It contained only his clothes and Cosmetics. The respondent is not expected to know its value in France. So what is claimed by the Plaintiff in his suit is only an approximate claim. The gold value of the Francs is to be determined by this court. Since, the appellant-Corporation has admitted to pay the value of 10 Kgs. of the luggage in Francs. The value of the same is determined by the lower court. The Plaintiff has also paid the necessary court-fee thereon. Hence, I find no reason to reject the claim of the Plaintiff to that extent.

8. It is no doubt true that the Respondent has filed an application under L.A.L. under order 41 Rule 3 C.P.C. requesting the court to direct the appellant to deposit or to furnish security to the decretal amount. That application is still pending. The learned Advocate for the Respondent submitted that the appellant should be directed to deposit the decretal amount or to furnish security. Under Order 41 Rule 3 C.P.C. a discretion is left to the Court to give such a direction. It may appear on the face of the records that this implication would be infructious by the following order. At the same time the appellant Corporation has its head office in a foreign country and in the interest of justice, it is necessary to bind it to pay the decretal amount. The appellant has not paid the amount even though the

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Respondent has lost his luggage in the year 1972. Therefore, in the result, I find no reason to interfere in the judgement and decree passed by the lower court and as such the following order:

ORDER

- a) For the reasons stated above, this appeal is hereby dismissed with costs;
- b) The Appellant is hereby directed to deposit the decretal amount or to furnish proper security if in case he intends to prefer a second appeal.

Dictated to the Stenographer, transcribed by him, corrected by me and then pronounced in open court this the 11th day of August 1978.

Sd/- (S. M. Byadgi)
Principal Civil Judge,
Civil Station, Bangalore

FRANKLIN MINT CORPORATION,
FRANKLIN MINT LIMITED, and McGREGOR,
SWIRE AIR SERVICES, LIMITED, Plaintiffs,

v.

TRANS WORLD AIRLINES,
INC., Defendant.

No. 81 Civ. 1700 (WK).

United States District Court,
S. D. New York.

Nov. 6, 1981.

As Amended Dec. 18, 1981.

MEMORANDUM AND ORDER

WHITMAN KNAPP, District Judge.

On March 23, 1979, plaintiff Franklin Mint Corporation ("Franklin") delivered to defendant Trans World Airlines, Inc. ("TWA") for carriage from Philadelphia, Pennsylvania to London's Heathrow Airport, four packages weighing some 714 pounds. Although the packages are said to have contained a large quantity of valuable coins, Franklin made no special declaration of value at the time of delivery. TWA charged Franklin \$544.96 for the shipment. The four packages never arrived at their destination, and Franklin brought this action to recover their full value, which it fixes at \$250,000. The parties agree that this action is governed by the terms of the Warsaw Convention, and that TWA is liable for the loss. Before us is a motion by TWA for partial summary judgment as to the extent of its liability. We grant that motion in part and deny it in part.

Article 22 of the Warsaw Convention provides that, unless a special declaration of value is made at the time

of a delivery, a carrier's liability for checked baggage and goods is limited to the equivalent of 250 francs per kilogram. Article 22 states, moreover, that this limitation of 250 francs:

"shall be deemed to refer to the French franc consisting of 65½ milligrams of gold at the standard of fineness of nine hundred thousandths [the so-called Poincaré franc]. These sums may *be converted into any national currency in round figures.*" (Emphasis added.)

Counsel for TWA, in an extraordinary lucid and comprehensive brief, has suggested three possible bases for the calculation converting the Article 22 limitation into United States dollars: (1) the Special Drawing Right ("SDR"), used by members of the International Monetary Fund ("IMF") as a unit of account; (2) the last official price of gold in the United States; and (3) the exchange value of the current French franc. Counsel for Franklin, in an equally able brief, suggests a fourth possibility: the free market price of gold.

Were we writing on a clean slate, we would find the arguments in favor of the first of TWA's suggestions (the SDR) most persuasive. However, TWA's second suggestion (the last official price of gold in the United States) has—arguably, at least—been espoused by the Civil Aeronautics Board ("CAB"), the government agency most intimately concerned with the transaction at hand. It therefore comes as close as anything to constituting a governmental interpretation of the Article 22 limitation. Also, it is used by all domestic carriers—including TWA—in calculating the dollar value of the Article 22 limitation printed on their tariffs. It would seem to follow that the

parties intended to adopt the last official price of gold as the basis for converting the Article 22 limitation into dollars in the instant case.

Beyond saying the foregoing we can, since there are no disputed issues of fact upon which a finding by us is required, see no purpose to be served by delaying a decision while we seek to put in our own words the arguments so cogently expressed by counsel for TWA. Accordingly, we simply adopt those arguments to the extent that they support our conclusion that the conversion should be premised on the last official price of gold in the United States.

Let counsel for TWA submit a proposed order on ten days notice. As we understand the stipulation of the parties, such an order would in effect direct that judgment be entered for plaintiff in the amount of \$6,475.98 plus interest and costs, a result which would permit immediate appeal from this order.

SO ORDERED.

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OPINION AND JUDGMENT OF THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 999—August Term, 1981
(Argued April 22, 1982 Decided September 28, 1982)
Docket No. 82-7012

FRANKLIN MINT CORPORATION,
FRANKLIN MINT LIMITED, and
MCGREGOR, SWIRE AIR SERVICES LIMITED,
Plaintiffs-Appellants,

—v.—

TRANS WORLD AIRLINES, INC.,
Defendant-Appellee.

Before:

OAKES, CARDAMONE, and WINTER,
Circuit Judges.

Appeal from a final judgment of the United States District Court for the Southern District of New York, Whitman Knapp, *Judge*, utilizing the last official price of gold to calculate the limit on defendant's liability under the Warsaw Convention.

The Court holds the limitation provision of the Convention prospectively unenforceable and affirms.

JOHN R. FOSTER, New York, New York (Donald M. Waesche, Waesche, Scheinbaum & O'Regan, P.C., New York, New York, of counsel), *for Plaintiffs-Appellants Franklin Mint Corporation, Franklin Mint Limited, and McGregor Swire Air Services, Limited.*

JOHN N. ROMANS, New York, New York (Robert S. Lipton, Scott J. McKay Wolas, Curtis, Mallet-Prevost, Colt & Mosle, New York, New York, of counsel) *for Defendant-Appellee Trans World Airlines, Inc.*

(Robert B. Hemley, Norman Williams, Gravel, Shea & Wright, Burlington, Vermont, of counsel) *for Amici-Curiae Jacques Roulin and Hugh Harley.*

WINTER, Circuit Judge:

This is an appeal from a final judgment of the United States District Court for the Southern District of New York, Whitman Knapp, *Judge*, limiting the defendant's liability under the Warsaw Convention ("Convention")¹ for loss of cargo. In determining the limit in United States dollars, Judge Knapp utilized the last official price of gold as a unit of conversion and awarded plaintiffs \$6,475.98. 525 F. Supp. 1288 (S.D.N.Y. 1981). Plaintiffs appeal, claiming the limit should have been calculated by other methods. While we agree with the result reached in this case and thus affirm, we hold the Convention's

¹The Warsaw Convention is formally known as the "Convention for the Unification of Certain Rules Relating to International Transportation by Air," opened for signature October 12, 1929, 49 Stat. 3000, T.S. No. 876, 137 L.N.T.S. 11 (adherence of the United States proclaimed October 29, 1934).

limit on liability prospectively unenforceable in United States Courts.

SUMMARY OF THE ISSUES AND DECISION

The facts in this case, if nothing else, are clear cut. In March 1979, plaintiffs Franklin Mint Corporation, Franklin Mint Limited, and McGregor, Swire Air Services Limited (collectively, "Franklin Mint") contracted with defendant Trans World Airlines, Inc. ("TWA") for the carriage by air from the United States to England of 714 pounds of numismatic materials. Though the articles were worth more than \$6,500, Franklin Mint made no special declaration of value. The articles were either lost or destroyed, thus rendering TWA liable under Article 18 of the Convention.² Because of the absence of a special declaration, TWA sought to limit its liability under Article 22 of the Convention.

Article 22 limits the carrier's liability for injuries to both "checked baggage and . . . goods" and "objects of

²Article 18 of the Convention reads:

(1) The carrier shall be liable for damage sustained in the event of the destruction or loss of, or of damage to, any checked baggage or any goods, if the occurrence which caused the damage so sustained took place during the transportation by air.

(2) The transportation by air within the meaning of the preceding paragraph shall comprise the period during which the baggage or goods are in charge of the carrier, whether in an airport or on board an aircraft, or, in the case of a landing outside an airport, in any place whatsoever.

(3) The period of the transportation by air shall not extend to any transportation by land, by sea, or by river

(Continued on next page)

which the passenger takes charge himself."³ The various limits are stated in terms of a specified number of French gold or "Poincare" francs, a unit of account consisting of "65½ milligrams of gold at a standard fineness of nine

(Continued from previous page)

performed outside an airport. If, however, such transportation takes place in the performance of a contract for transportation by air, for the purpose of loading, delivery or transshipment, any damage is presumed, subject to proof to the contrary, to have been the result of an event which took place during the transportation by air.

³Article 22 of the Convention reads:

(1) In the transportation of passengers the liability of the carrier for each passenger shall be limited to the sum of 125,000 francs. Where, in accordance with the law of the court to which the case is submitted, damages may be awarded in the form of periodical payments, the equivalent capital value of the said payments shall not exceed 125,000 francs. Nevertheless, by special contract, the carrier and the passenger may agree to a higher limit of liability.

(2) In the transportation of checked baggage and of goods, the liability of the carrier shall be limited to a sum of 250 francs per kilogram, unless the consignor has made, at the time when the package was handed over to the carrier, a special declaration of the value at delivery and has paid a supplementary sum if the case so requires. In that case the carrier will be liable to pay a sum not exceeding the declared sum, unless he proves that that sum is greater than the actual value to the consignor at delivery.

(3) As regards objects of which the passenger takes charge himself the liability of the carrier shall be limited to 5,000 francs per passenger.

(4) The sums mentioned above shall be deemed to refer to the French franc consisting of 65½ milligrams of gold at the standard of fineness of nine hundred thousandths. These sums may be converted into any national currency in round figures.

hundred thousandths." The limit on baggage or other goods is 250 Poincare francs per kilogram. The dollar value of that limit is calculated simply by converting the gold value of the specified unit into United States Dollars, *e.g.*, the limit per kilogram is 250 multiplied by the dollar value of 65½ milligrams of gold.

The difficulty arises from the fact that when Article 22 was drafted, gold served official monetary functions and its price was set by law. The Convention thus selected it as the unit of conversion in order to ensure judgments of uniform value as well as a stable and easily calculable limitation on liability. The plain but highly troublesome fact is that by international agreement and United States domestic legislation gold has now lost its monetary functions and no longer has an official price. Unfortunately for parties to international airline transactions as well as for us, the terms of Article 22 continue to utilize gold as the unit of conversion. Thus, the parties raise the issue of what unit of account is now to be used to convert judgments under the Convention into United States dollars.

In arguing the issue, the parties offer four alternatives: (i) the last official price of gold in the United States; (ii) the free market price of gold; (iii) the Special Drawing Right ("SDR"), a unit of account established by the International Monetary Fund ("IMF") and recently proposed as a substitute for gold in the as yet unratified Montreal Protocols to the Convention; and (iv) the exchange value of the current French franc. While acknowledging that "the arguments in favor of . . . the SDR [were] most persuasive," Judge Knapp nevertheless held that the last official price of gold was the appropriate standard. This choice was predicated on the view that

this standard "has been . . . espoused by the Civil Aeronautics Board ("CAB"), the government agency most intimately concerned with the transaction at hand," and has been "used by all domestic carriers—including TWA—in calculating the dollar value of the Article 22 limitation printed on their tariffs." 525 F. Supp. at 1289.

We share Judge Knapp's doubt about the result. Indeed, there are powerful arguments against each of the proffered solutions. The last official price of gold is a price which has been explicitly repealed by the Congress. See note 11, *infra*, and accompanying text. It thus lacks any status in law or relationship to contemporary currency values. The free market price of gold is the highly volatile price of a commodity determined in part by forces of supply and demand unrelated to currency values. SDR's are a creature of the IMF, modified at will by that body and having no basis in the Convention. The French franc is simply one domestic currency, subject to change by the unilateral act of a single government.

Every proffered solution thus appears to have a devastating argument against it. While the Convention has not been formally abrogated, enforcement by national judicial tribunals is impossible without their picking and choosing among alternative units of conversion according to their view of which is best as an initial policy matter. We have no power to select a new unit of account. We thus hold the Convention's limitation of liability unenforceable by United States Courts.

BACKGROUND

Drafted in the late 1920's, the Convention was designed both to protect the fledgling aviation industry

from the alternatives of ruinous damage suits or exorbitant insurance premiums and to insure a certain degree of uniformity of legal obligation given the expected international character of the industry. See A. Lowenfeld and A. Mendelsohn, *The United States and the Warsaw Convention*, 80 Harvard L. Rev. 497, 499-501 (1967) (hereafter "Lowenfeld and Mendelsohn"); see also *Reed v. Wisner*, 555 F.2d 1079, 1089 (2d Cir.), cert. denied, 434 U.S. 922 (1977) and CAB Staff Memorandum, Warsaw Convention Liability Limits, March 18, 1980, at 5-6. (App. at 43-44). A series of rules governing liability, affirmative defenses and limitations accomplished the former goal, while the Convention's international scope accomplished the latter. Articles 17, 18 and 19 enunciate the carrier's liability for personal injuries, for damage or loss of baggage, and for damage due to delay. Articles 20 and 21 establish as affirmative defenses lack of fault and contributory negligence. Finally, Article 22 provides a limitation on the extent of liability for both personal injury and loss of luggage or other goods.

The personal injury limitations amounts have been subject to upward revision from time to time through protocols to the original agreement. These revisions have come in the wake of a continuing debate, with the developed countries, notably the United States, Great Britain and France, arguing for higher limits, and the less developed nations seeking reduction of the existing limit.⁴

⁴In 1955, at The Hague, the conferees would agree only to a doubling of the limit to 250,000 Poincare francs of \$16,000. Lowenfeld and Mendelshon at 504-09. The United States un-

Lowenfeld and Mendelsohn at 504. Throughout this period, the level of the limitations on liability for loss or destruction of checked baggage and other goods has remained the same.

Defining recoveries in terms of a specified amount of gold was intended to produce stability and uniformity. Such a common standard allowed the conversion of liability limits into national currencies and insulated recoveries from the vicissitudes of currency fluctuation and devaluation. In drafting the Convention, a proposal to fix recoveries purely in term of the French franc was rejected by Switzerland on the ground that use of a single national currency rendered the liability limit subject to change by the act of one government. See Second International Conference on Private Aeronautical Law, Minutes, Octo-

(Continued from previous page)

enthusiastically signed the Hague Protocol a year later, but did not present the treaty to the Senate until July 1959. Lowenfeld and Mendelsohn at 515. The Senate never consented to the Protocol because of its low limit, however, and ultimately the Kennedy/Johnson Administrations actually threatened United States denunciation of the Convention. This threat came in the wake of Congress' failure to enact a legislative package ratifying the Hague Protocol while compelling the purchase by all American air carriers of \$50,000 in insurance for each passenger. To avoid United States denunciation, a conference met in Montreal in the spring of 1966. The result of this meeting was the so-called Montreal Agreement "which provided for absolute carrier liability up to \$75,000 on all flights into or out of the United States." *Reed v. Wiser*, 555 F. 2d at 1087. Appeased, the United States withdrew its denunciation. However, it continued to press for an amendment to the Convention raising personal injury liability limits. In 1971, the parties promulgated the Guatemala City Protocol under which personal injury limits were to be raised to \$100,000 at the then current exchange rate of \$35 per ounce of gold." *Id.* at 1089 n.12. However, the United States has not ratified that protocol.

ber 4-12, 1929, Warsaw, at 88-89 (Horner and Legrez trans. 1975), (App. at 247-248). As the Swiss delegate put it, "Naturally one can say 'French franc' but . . . its [France's] national law which determines it, and one need have only a modification of the national law to overturn the essence of this provision." *Id.* at 89-90, (App. at 248-249). Accordingly, the Swiss pressed for a standard which tied the limitation to a gold value regardless of the national currency actually named in the article. *Id.* at 90, (App. at 249). The conferees accepted the Swiss position and stated the limitation in terms of the Poincare franc defined as "65½ milligrams of gold at a standard fineness of nine hundred thousandths." Convention, art. 22 § (4).¹

From October, 1934, when the United States first adhered to the Convention, until 1978, use of gold as the unit of account posed no problem for United States or the judicial tribunals of other signatory nations. In 1934, the value of gold was set at \$35 per troy ounce pursuant to statute, United States Gold Reserve Act of 1934, Pub. L. No. 73-87, 48 Stat. 337 (1934). When the United States became a party to the International Monetary Fund (IMF) in 1945, *see* Bretton Woods Agreements Act, ch.

¹There was only one change made in this standard at the Hague in 1955. To avoid any confusion, the conferees deleted reference to the Poincare franc and defined the specified sums as referring "to a currency unit consisting of sixty-five and a half milligrams of gold of millesimal fineness nine hundred." Asser, *Golden Limitations of Liability in International Transport Conventions and the Currency Crisis*, 5 J. Mar. L. & Com. 645, 647-48 n.7 (1974). Since the United States never ratified the Hague Protocol, the old language still governs American courts. That change, however, is entirely formal, since the elimination of any reference to the French franc merely clarified the Convention's desire to use gold, a point never doubted in the United States.

339, § 2, Pub. L. No. 79-171, 59 Stat. 512 (1945) (codified at 22 U. S. C. § 286 (1976)), it promised to maintain (and, of necessary, redeem) the value of United States dollars in terms of gold. For purposes of the Convention's limits on liability, therefore, the relationship of gold and the dollar allowed judicial tribunals to award judgments on a stable, uniform basis.

At the time of Bretton Woods, the United States dollar was grossly undervalued and was actually an asset more valuable than gold. The promise to redeem all dollars in gold could thus be made without having to be fulfilled.⁶ From 1955, however, the United States faced a persistent balance of payments deficit. Where once there existed a dollar shortage, there now developed a dollar glut.⁷ To compensate, central banks abroad began trading their dollars for gold, and hoarders and speculators began accumulating the metal in increasing amounts. From 1955 to 1968, United States gold reserves plummeted from approximately \$24 billion to around \$10 billion.⁸

These events led ultimately to the demise of the gold standard. In early 1968, depletion of the United States gold reserve led the central banks of Belgium, the Federal Republic of Germany, Italy, the Netherlands, Switzerland, the United Kingdom and the United States to agree to discontinue supplying gold to private markets. A so-called "two-tier" system of gold pricing—a market price set accordingly and the official price set under Bretton

⁶See P. Samuelson, *Economics*, 686-88 (8th ed. 1970).

⁷*Id.* at 690-91.

⁸*Id.* at 691, Figure 36-1.

Woods⁹—was thus created. This eased the pressure but could not remedy the essential flaw. In addition to persistent United States balance of payment deficits, international gold reserves grew more slowly than the volume of world economic activity. As a consequence, banks faced pressures to liquidate official holdings in light of readily available market profits. The stage was thus set for abandonment of the Bretton Woods arrangements.

In August 1971, the United States suspended its commitment to convert dollars for gold.¹⁰ In May 1972, it devalued the dollar by raising the official price of gold to \$38 per ounce. See Par Value Modification Act, Pub. L. No. 92-268, § 2, 86 Stat. 116 (1972) (formerly codified at 31 U.S.C. § 449 (1972)). In October 1973, yet another devaluation raised the price to \$42.22 per ounce. See Par Value Modification Act, amendments, Pub. L. No. 93-110, § 1, 87 Stat. 352 (1973) (formerly codified at 31 U.S.C. § 449 (1976)).

The dollar's troubles led the IMF to put forth a plan to abolish the official price of gold, to delete references to gold in its articles, and to substitute SDR's as the Fund's reserve asset and unit of account. The plan was proposed in the 1976 Jamaica Accords, was passed by the Fund's members and became effective April 1, 1978. In the interim, the United States passed implementing legislation including a repeal of the Par Value Modification Act of

⁹See Asser, *supra* note 6, at 650; Gold, *International Monetary Law: Change, Uncertainty and Ambiguity*, 15 J. Int'l L. & Econ. 323, 340-41; Samuelson, *supra* note 7, at 698-99.

¹⁰*Id.* at 641; *supra* note 6, at 651.

1973 and the abolition of the official price of gold.¹¹ Along with the Jamaica Accords, the measure also became effective on April 1, 1978.

This radical change in the international monetary system created an obvious problem under the Warsaw Convention. With gold abandoned as a currency base and the official price repealed, gold became a commodity with a daily fluctuating free market price. That the difficulty in continuing to use gold as a monetary base undermined the Convention's unit of conversion was immediately recognized. Thus, the Warsaw conferees met in Montreal in 1975, even before the Jamaica Accords, and drafted and signed a Protocol substituting SDR's as the Convention's unit of conversion. At the time of the proposal, the SDR was calculated in terms of gold.¹² With the Jamaica Accords, the referent was changed to a basket of 16 national currencies, and in January 1981, the basket was reduced to five currencies.¹³ The Montreal Protocol was presented to the United States Senate in January 1977 but has not been approved.

Meanwhile parties to the Convention have utilized a variety of units of conversion. The record shows Sweden

¹¹In repealing the official price generally, Congress retained its use for the limited purpose of determining the value of gold held in the form of gold certificates. See 31 U.S.C. § 405(b). The Senate noted that this was the "only domestic purpose for which it is necessary to define a fixed relationship between the dollar and gold. . . ." S. Rep. No. 1295, 94th Cong., 2d Sess. 18, reprinted in 1976 U.S. Code Cong. & Ad. News 5935, 5966-67.

¹²Gold, *supra* note 10, at 345.

¹³Ward, *The SDR in Transport Liability Conventions: Some Clarifications*, 13 J. Mar. L. & Com. 1, 3 (1981).

and Britain have adopted SDR's for purposes of Warsaw.¹⁴ Both a Netherlands court and the Civil Court of Rome reached the same result.¹⁵ Two French courts have recently decided that the Warsaw unit is to be converted simply into the current French franc.¹⁶ The United States District Court in the Southern District of Texas recently opted for the free market price of gold,¹⁷ the standard utilized by an Indian court,¹⁸ and a Greek court.¹⁹ Finally, the last official price of gold, chosen by the District Court in this case, was relied upon by Judge Sifton in *In re Air Crash Disaster at Warsaw Poland on March 14, 1980*, 535

¹⁴See Sweden's Carriage by Air Act (1957), amendment to Chapter 9, § 22, effective April 27, 1978, (translated and reprinted in App. at 57-61); see also the British Carriage by Air (Sterling Equivalents) Order of 1980, Statutory Instrument 1980 No. 281, effective March 21, 1980, (reprinted in App. at 62-63).

¹⁵*State of the Netherlands v. Giant Shipping Corp.*, Rechtspraak van de Week, 30, May, 1981, 321 (Supreme Court of the Netherlands, May 1, 1981) (translated and reprinted in App. at 64-93); *Linee Aerea Italiane v. Ricciole* (Rome Civil Court judgment 609/1979, Nov. 14, 1978), (translated and reprinted in App. at 95-108).

¹⁶See *Chamie v. Egyptair* (Cours d'appel Paris, Jan. 31, 1980) (translated and reprinted in App. at 171-91); *Pakistan Int'l Airlines v. Compagnie Air Inter. S.A.*, (Cours d'appel Aix-en-Provence Oct. 31, 1981) (translated and reprinted in App. at 156-70).

¹⁷*Boehringer Mannheim Diagnostics, Inc. f/k/a Hycel, Inc. v. Pan American World Airways, Inc.*, 531 F. Supp. 344 (S.D. Tex. 1981).

¹⁸*Kuwait Airways Corp. v. Sanghi*, Regular Appeal No. 54 of 1977 (Civil Station, Bangalore, India, August 11, 1978) (reprinted in App. at 265-71).

¹⁹*Zakoupolos v. Olympic Airways Corp.*, No. 256 of 1974 Ct. of App.; 3d Dep't., Athens, Greece (February 15, 1974) (translated and reprinted in App. at 251-54).

F. Supp. 833 (E. D. N. Y. 1982) and is still utilized by the CAB pursuant to a 1974 order.

DISCUSSION

The controlling facts in this case are: (i) enforcement of the Convention's limitation on liability requires a unit of conversion to translate judgments into domestic currency; (ii) there is no longer an internationally agreed upon unit of conversion; and (iii) there is no United States legislation specifying a unit to be used by United States Courts.

The need for a unit of conversion is self-evident. Without it, a rational limit on liability cannot exist, much less one which produces judgments of equal value in different currencies.

The lack of an internationally agreed upon unit is also obvious. The very convening of the Montreal meeting in 1975 was a recognition by the Warsaw parties that the Convention's unit had been eliminated by events. In plain fact, different countries now apply different units. Although the alternatives argued before us yield limitations on TWA's liability in this case ranging from less than \$6,500 to over \$400,000, each has been adopted as the proper unit of account by at least one party, or domestic tribunal of a party, to the Convention. This disarray merely confirms the obvious fact that the Jamaica Accords destroyed the international arrangements which had led to adoption of gold as a unit of conversion.

International disarray is also reflected in the lack of legislation in the United States implementing the Convention by establishing a unit of conversion. While the "last"

official price of gold is offered as a possible unit, "last" is really a euphemism for "no longer" or "repealed." The repeal of the Par Value Modification Act in 1978 was in every sense a legislative declaration that the price of \$42.22 per troy ounce was no longer recognized by the United States.²⁰ We fail to see the logic in adopting as a legal standard a specified value for gold which has been specifically rejected by the United States Congress. Congress' action, moreover, as well as that taken by the other parties to the Jamaica Accords, is highly relevant to the Convention. The repeal of the Par Value Modification Act was based on a domestic and international conclusion that the official price of gold was wholly out of touch with economic and monetary reality. Since use of a fixed amount of gold as the Convention's unit was specifically designed to establish a limitation level at a certain value, this repeal must be taken as a statement that the official price no longer reflects that specified value. The case for continuing to use the now repealed price of gold thus finds no support in law or logic.

The CAB order on which Judge Knapp relied was expressly premised on the existence of an official price under the Par Value Modification Act of 1973. The more recent internal CAB memorandum supporting continuation of that order is based ultimately on a policy determination that the last official price is the best available standard.²¹ The inconsistency of the CAB position, however,

²⁰The sole remaining use of the last official price is in determining the value of gold in the form of gold certificates. See note 12, *supra*. That is not relevant to the issues here.

²¹CAB Internal Memorandum, Warsaw Convention Liability Limits, May 20, 1981 (App. at 32-38).

is starkly evident. It rejects SDR's because the Senate has not approved the Montreal Protocol, while adopting the last official price of gold which has been explicitly rejected by the Congress. The sole criterion supporting the CAB's position appears to be the law of inertia.

The other alternatives have an equally infirm base. Neither the free market price of gold nor the current French franc was ever agreed to by the treaty's framers, both are gross departures from its purposes, and, as to the latter, there is ample evidence that it was specifically rejected. The framers clearly contemplated use of the governmentally fixed price of gold in adopting it as a unit of account in the hope of providing stability.²² The free market price of gold, however, is simply the daily fluctuating price of a commodity, affected by conditions relating to supply and nonmonetary uses affecting demand. The current French franc is similarly flawed. To enforce it would amount to a deliberate departure from the expressed wishes of the framers to avoid the use of a single national currency subject to unilateral action.

TWA argues that we should adopt the International Monetary Fund's SDR as the unit of conversion. It is true that the SDR was "created by the IMF in 1969 to replace gold and foreign exchange as an international reserve asset."²³ "[M]ember central banks may exchange SDR's for other convertible currencies and, therefore, SDR balances are actually lines of credit against which

²²Appellant's reliance on dicta in our decision *Reed v. Wiser*, 555 F.2d at 1089 n.12, is misplaced. The *Reed* footnote implied a free market standard under the Guatemala City Protocol which the U. S. has not ratified.

²³Ward, *supra* note 14, at 2.

reserves may be borrowed for use in central bank operations."²⁴ As noted above, methods of calculating SDR's have been changed from time to time. They are presently calculated with reference to a so-called basket of five currencies—the U. S. dollar, the Deutsche mark, the French franc, the Japanese yen, and the pound sterling. The amount of each currency in one SDR is a function of the percentage weights which are assigned to each currency in the basket. The dollar value of one SDR is then determined by adding the "dollar values of each currency component based on daily market exchange rates."²⁵

Though the value of any one currency in terms of SDR's fluctuates from day to day, SDR fluctuations are generally less extreme than fluctuations in the free market price of gold. The relative stability of the SDR has thus led the Warsaw signatories to propose its substitution as the Convention's unit of account. The proposal was formally drafted in 1975 as part of the Montreal Protocols to the Convention and has been presented to the signatory states for ratification. Though the substitution was supported by the United States, there has been opposition by non-IMF signatories and very few signatories (the United States included) have actually ratified the Protocol.

The inappropriateness of our adopting SDR's as the unit of conversion is plain. The Convention itself contains not the slightest authority for its use and the Senate has thus far declined to ratify the Montreal Protocols. Moreover, the decision in principle to use SDR's is only

²⁴*Id.*

²⁵*Id.* at 3.

the first step. After that, a further step must be taken to define the limitation of liability in terms of a particular number of SDR's per kilogram of baggage. In effect, we would have to set the level of the limitation. Finally, the SDR is a creature of an international body, the IMF, and is subject to modification or outright elimination by that body. In fact, the method of calculating SDR's has been changed three times in the last seven years. This Court has no power under the terms of the Convention or relevant domestic source of authority to adopt a unit of conversion variable at the whim of an international body distinct from the parties to the Convention.

It is thus clear that neither international nor domestic sources of law specify a unit of account for purposes of the Convention. We deal here not with ambiguities which may be clarified by reference to underlying purpose or with language which inadequately mirrors the understood intentions of the drafters. For almost two generations, the Convention's limits on liability have been translatable into domestic currency values by application of a clear and easily applied formula. An essential ingredient of that formula has, as a consequence of international action followed by domestic legislation, ceased to exist. What the parties ask us to do is to select, upon the basis of our judgment as to what is best as a matter of policy, a new unit of conversion. We are without authority to do so.

Treaty advice and consent and proposal is the province of the executive and ratification is the exclusive province of the United States Senate. U. S. Const. art. II, § 2, cl. 1; *Doe ex dem. Clark et al. v. Braden*, 16 How. 635, 656-57 (1853). While federal courts are necessarily called

upon to interpret treaties, *The Federalist* No. 3 (J. Jay) (Rossiter ed. 1961); see also *id.* No. 80 (A. Hamilton), they must observe the line between treaty interpretation on the one hand and negotiation, proposal and advice and consent and ratification on the other. See *Baker v. Carr*, 369 U. S. 186, 211-12 (1961). To be sure, great difficulty may arise in ascertaining where that line is drawn and when it has been crossed.²⁶ See, e. g., *Goldwater v. Carter*, 444 U. S. 996 (1979). However, selection of a unit of conversion and the level of value of a limitation on liability is plainly a matter to be negotiated by the parties, as the history of the Convention demonstrates.

While international disarray as to the proper unit of conversion under the Convention alone might not disable us from enforcing a new unit, such a unit must be selected either through treaty approval by the Senate or by legislation passing both Houses of the Congress. The repeal of the Par Value Modification Act was an explicit abandonment of the previously established unit of conversion. While Congress may not have focused explicitly upon the Convention in repealing that Act, its purpose, abandonment of a price which was out of touch with economic

²⁶Given the lack of an internationally agreed upon standard of conversion, it might be argued that the Convention has been abrogated. However, treaties involve international obligations entered into by coordinate branches of the government and it is not the province of courts to declare treaties abrogated or to afford relief to those (including the parties) who wish to escape their terms. These are not matters for "judicial cognizance." *Whitney v. Robertson*, 124 U. S. 190, 194 (1887); see also *Terlinden v. Ames*, 184 U. S. 270 (1901). They belong to the executive and legislative departments because they are more properly the domain of "diplomacy and legislation, . . . not . . . the administration of laws." *Whitney v. Robertson*, 124 U. S. at 195.

reality, plainly encompasses use of that price to convert judgments to United States currency values. Congress thus abandoned the unit of conversion specified by the Convention and did not substitute a new one. Substitution of a new term is a political question, unfit for judicial resolution. We hold, therefore, that the Convention's limits on liability for loss of cargo are unenforceable in United States Courts.²⁷

CONCLUSION

This ruling is prospective and will apply only to events creating liability occurring 60 days from the issuance of the mandate in this case. Prospective effect is compelled by the fact that this is the first case in which a court has declined to enforce the Convention's limits on liability. The parties assumed our power to select a new unit and thus our "resolution was not clearly foreshadowed." *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106 (1971). Parties to transactions covered by the Convention should have time to adjust their affairs to this ruling. *Cf. Northern Pipeline Construction Co. v. Marathon Pipeline Co.*, 50 U.S. L.W. 4892 (U.S. June 28, 1982) (judgment holding Bankruptcy Act unconstitutional stayed until October 4, 1982). As to events occurring before that date, we hold that the last official price of gold shall be used to calculate the

²⁷The Convention establishes liability as well as limits it. Note 2, *supra*. Our holding is limited solely to the unenforceability of the limits and we express no view as to the severability of those limits from the rest of the Convention.

limits on liability. Because of both the CAB ruling discussed above and the lack of alternatives, air carriers, at least in this country, have relied on the last official price of gold. All carriers have thus filed tariffs that comply with that standard and substantial "injustice and hardship" would result were they not allowed time to reformulate those tariffs. Other parties may continue to protect themselves through insurance.

Affirmed.

Docket Number
82-7012

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

FRANKLIN MINT CORPORATION, *et al.*,
Plaintiffs-Appellants,
v.

TRANS WORLD AIRLINES, INC.,
Defendant-Appellee.

NOTICE OF MOTION

for Stay of Issuance of Mandate

Motion By:

CURTIS, MALLET-PREVOST, COLT & MOSLE

Robert S. Lipton, Esq.

(212) 696-6045

Has a request of opposing counsel for
consent been refused? (X) Yes

Has service been effected? (X) Yes

Is oral argument desired? (X) No
(*Substantive motions only*)

Requested return date:
(*See Second Circuit Rule 27(b)*)

Date of argument of appeal, if scheduled:

Judge or agency whose order is being appealed:

OPPOSING COUNSEL: (*Name and tel. no. of attorney in
charge*)

WAESCHE, SHEINBAUM & O'REGAN, P.C.

John R. Foster, Esq.

(212) 227-3550

Brief statement of the relief requested: Order staying the issuance of mandate in this case pending the filing by defendant-appellee Trans World Airlines, Inc. ("TWA") of a petition for certiorari in the Supreme Court and until final disposition therein of the case.

Previous requests for similar relief and disposition:
None.

Statement of the issue(s) presented by this motion:
Whether an order staying issuance of the mandate in this case should be entered since TWA expects and intends to make proper and timely application to the Supreme Court of the United States by a petition for writ of certiorari for review of certain aspects of the decision and judgment of this Court in this case.

Brief statement of the facts (with page references to the moving papers): The relevant factual background is set forth at paragraphs 2 and 3 of the Affidavit of John N. Romans, sworn to on December 6, 1982, and submitted in support of this motion.

Summary of the argument (with page references to the moving papers): Pursuant to the provisions of Section 2101(f), Title 28 U. S. C. and Rule 41(b) of the Federal Rules of Appellate Procedure, an order should be entered staying issuance of the mandate in this case on the ground that it is the *bona fide* intention of TWA to make proper application to the Supreme Court within the time allowed by law for a writ of certiorari. The grounds upon which TWA's petition for certiorari will be based are set forth at paragraph 5 of the Romans Affidavit mentioned above. —

12/7/82

Date

ROBERT S. LIPTON

The name signed must be printed beneath

Robert S. Lipton

Attorney for Defendant-Appellee.

JA213

ORDER

IT IS HEREBY ORDERED

that the motion be and it hereby
is *granted*

JAMES L. OAKES

Hon. James L. Oakes

RICHARD J. CARDAMONE

Hon. Richard J. Cardamone

RALPH K. WINTER

Hon. Ralph K. Winter

December 17, 1982

No. 82-1186

Office - Supreme Court, U.S.
FILED

APR 6 1983

ALEXANDER L. STEVAS.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

TRANS WORLD AIRLINES, INC.,

Petitioner,

against

FRANKLIN MINT CORPORATION,

FRANKLIN MINT LIMITED, and

McGREGOR, SWIRE AIR SERVICES, LIMITED,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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(212) 227-3550

Counsel for Respondents

Franklin Mint Corporation

Franklin Mint Limited

*McGregor, Swire Air Services,
Limited*

WAESCHE, SHEINBAUM & O'REGAN, P.C.

Of Counsel

April 5, 1983

Questions Presented

1. Whether a treaty provision should be enforced notwithstanding a subsequent Act of Congress which abandoned the premise upon which the treaty provision had been based?

2. What is the proper conversion factor, if any, for the gold franc provision in the Warsaw Convention in view of the Congressional decision to eliminate an official price for gold?

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No. 82-1186

In The
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

TRANS WORLD AIRLINES, INC.,

Petitioner,

against

FRANKLIN MINT CORPORATION,
FRANKLIN MINT LIMITED, and
MCGREGOR, SWIRE AIR SERVICES LIMITED,

Respondents.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Second Circuit

RESPONDENTS' BRIEF IN OPPOSITION

The petition of Trans World Airlines, Inc. ("TWA") was served on 15 January 1983. The respondents, Franklin Mint Corporation, Franklin Mint Limited, and McGregor, Swire Air Services, Limited (collectively "Franklin Mint"),¹ did not file a brief in opposition within the thirty-day period set by Rule 22 because they filed their own petition on 1 March 1983. This filing was within the ninety-day period established by 28 U.S.C. 2101(c) and bears docket number 82-1465.

By letter dated 7 March 1983 the Court, by its Clerk, requested Franklin Mint to file a response to TWA's petition.

¹Respondents' designation of corporate relationships pursuant to Rule 28.1 is stated in the appendix to this brief.

In addition Franklin Mint was also requested to address the issue of whether the International Air Transport Association ("IATA") and several of its member airlines should be permitted to intervene as parties to this proceeding. In response to the Court's request, Franklin Mint respectfully submits this brief.

ARGUMENT

POINT I

TWA lacks standing to petition this Court.

The district court granted TWA's motion to limit its liability. The Second Circuit affirmed this result.

"[T]he successful party below has no standing to appeal" from a judgment in his favor. *Public Service Commision v. Brashear Lines*, 306 U.S. 204, 206 (1939). Although the literal language of 28 U.S.C. §1254(1) says "any party", there is apparently no instance when the Court "has granted a petition filed by a party who prevailed on the merits in the court of appeals." R. Stern & E. Gressman, *Supreme Court Practice* 58 (5th ed. 1978) (footnote omitted). The only victorious parties whose petitions under §1254(1) have been granted have been those litigants prevailing in the district court and who filed a petition (1) after the losing party had appealed to the court of appeals and docketed the record in that court, but (2) before rendition of judgment by the appellate court. See, e.g., *United States v. Nixon*, 418 U.S. 683, 686-87 (1974); *United States v. United Mine Workers*, 330 U.S. 258, 269 (1947); see also, R. Stern & E. Gressman, *Supreme Court Practice* 434 (5th ed. 1978).

In the present case TWA was the victorious appellee in the proceeding before the Second Circuit. Consequently, its petition before this Court should be denied.

POINT II

The Court of Appeals did not act unconstitutionally.

In its petition TWA portrays the Second Circuit's decision as radically "abrogating a treaty" (TWA petition, p. 10). In fact, however, the appellate court's decision was not quite so dramatic and, in any event, was firmly supported by constitutional principles.

The Warsaw Convention² must first of all be seen in context. This multilateral convention was finalized in October 1929 based on a preliminary draft developed during the prior year. The airline industry was then in its infancy. Lindbergh crossed the Atlantic in 1927 and Earhart did so in 1928. "The larger airliners could carry 15 to 20 passengers at cruising speeds of about 100 miles per hour and over stages of about 500 miles." A. Lowenfeld, *Aviation Law* §2.1 at 7-26 (2d ed. 1981).

The Reporter to the Warsaw Convention, Henri de Vos, pointed out in his introductory remarks that in Belgium "on one single aerodrome in the summer season, there are up to 36 departures of regular lines by day." Minutes, Second International Conference on Private Aeronautical Law, October 4-12, 1929, Warsaw, 23 (Horner and Legrez trans. 1975). As the result of developments, there was "the possibility that tomorrow, in all countries, facilities will be set up for both day and night flights!" *Id.* The conclusion to be drawn was that "What the engineers are doing for machines, we, lawyers, must do the same for the law." *Id.*

The Convention was seen as the beginning of an on-going process to codify international air law. As a vice-president of the Convention stated

²Formally known as the Convention for the Unification of Certain Rules Relating to International Transportation by Air, *opened for signature* October 12, 1929, 49 Stat. 3000, T.S. No. 876 (1934), 137 L.N.T.S. 11, *reprinted in* 49 U.S.C. §1502 note (1970).

Therefore, we should consider that in air navigation, it is necessary to begin by laying down the primary general rules of the problem; we make a first effort and we must be happy to do so. If there are improvements to be brought forth, life does not end today, we can do them later on. (*Id.* at 32.)

During the discussions of the Convention's liability limits, a French delegate noted that they were dealing with "a Convention which is drawn for a few years" (*id.* at 90).

The problem in the present case arises from the simple fact that the Convention was designed for a world in which the aviation industry and the international monetary system were radically different than they are now. Both on the international level and in the United States, the Warsaw Convention has proven to be extremely difficult to amend.³ The unhappiness of the United States with the archaic provisions of the Convention has already led once to this country denouncing the Convention, although this renunciation was later withdrawn when the airlines made certain concessions. See 53 Dep't. State Bull. 923 (1965) and 54 Dep't. State Bull. 955-57 (1966).

In 1929, as well as in 1934 when the United States adhered to the treaty, there was no problem in converting the Convention's gold franc into dollars because there was a gold/dollar exchange rate set by statute. Gold Reserve Act of 1934, 48 Stat. 337 (1934); Presidential Proclamation No. 2072 of January 31, 1934, 48 Stat. 1730 (1934); Act of March 14, 1900, ch. 41, §1, 31 Stat. 45 (1900).

The existence of an official price of gold was the basic assumption on which the liability limit was based. Indeed, in 1929 and for several decades afterwards, there was internationally only

³Although several amendments to the Convention have been proposed, none has been adopted in the United States. Other countries, such as the United Kingdom, adhere to the Convention in an amended form.

the one official price.⁴ During the early 1970's as this official price occasionally changed, the Civil Aeronautics Board would state what the new limits were in dollars. See, e.g., Civil Aeronautics Board Order 74-1-16, 39 Fed. Reg. 1526 (1974).

In 1976, in the so-called Jamaica Accords, the United States and other members of the International Monetary Fund decided to remove gold as the linchpin of the international monetary system. As part of its implementation of the Jamaica Accords, the United States repealed the Par Value Modification Act. In its final form that Act had mandated that one dollar "equals 0.828948 Special Drawing Right or, the equivalent in terms of gold, of forty-two and two-ninths dollars per fine troy ounce of gold." Par Value Modification Act, Pub. L. No. 92-268, 86 Stat. 116 (1972), amended by Pub. L. No. 93-110, 87 Stat. 352 (1973). In the Act of October 19, 1976, Pub. L. No. 94-564, 90 Stat. 2660 (1976), the par value of the dollar in terms of gold (and Special Drawing Rights) was eliminated. Consequently, by eliminating an official gold/dollar relationship, the Congress abandoned the basic assumption upon which the Convention's liability limit was based.

The legal principles applicable to the foregoing facts are straightforward. The interpretation of a treaty is a judicial question. *Sullivan v. Kidd*, 254 U.S. 433, 442 (1921); see also *Baker v. Carr*, 369 U.S. 186, 211-12 (1962); *Society for the Propagation of the Gospel In Foreign Parts v. New Haven*, 21 U.S. (8 Wheat.) 464, 491-94 (1823). A treaty is to be regarded as equivalent to an act of the legislature. *Valentine v. United States ex rel. Neidecker*, 299 U.S. 5, 10-11 (1936); *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 314 (1829) (Marshall, C. J.). A treaty stands no higher than any other legislative act. *Whitney v. Robertson*, 124 U.S. 190, 194 (1888).

⁴In *Pierre v. Eastern Air Lines*, 152 F. Supp. 486, 487-88 (D.N.J. 1957), the court referred to a plaintiff's "provable damages against the carrier to the extent of an international gold standard of approximately \$8,300, in case of ordinary negligence."

Thus it is clear that a treaty may be modified by a subsequent act of Congress. *Moser v. United States*, 341 U.S. 41, 45 (1951). A treaty may be entirely abrogated by a later statute. *Whitney v. Robertson*, 124 U.S. 190, 194-95 (1888); *Edye v. Robertson (The Head Money Cases)*, 112 U.S. 580, 597-99 (1884); *The Cherokee Tobacco*, 78 U.S. (11 Wall.) 616, 620-21 (1870).

In the present case the Congress abandoned the assumption concerning gold upon which Article 22 of the Convention had been based for over 45 years. The conclusion of the court of appeals that the subsequent Congressional act modified the Warsaw Convention is a decision that makes sense and is constitutionally valid.

Since the filing of TWA's petition, the Senate has had a perfect opportunity to render moot the Second Circuit's decision. Protocols 3 and 4 of the Montreal Protocols of 1976⁵ came up for a vote on 8 March 1983 and were soundly rejected by the Senate. 129 Cong. Rec. S2279 (daily ed. March 8, 1983). Examination of the floor debates shows that the Protocols were asserted as a means of resolving *Franklin Mint* and other cases⁶ that reflect "a growing frustration, and even rebellion, by the U.S. court system against the present [Warsaw] system." 129 Cong. Rec. S2277 (remarks of Sen. Percy). Nevertheless the Protocols were defeated, which was apparently the first time since 1960 that a treaty had been rejected by the Senate. "Air Liability Treaty Rejected by Senate," N.Y. Times, March 9, 1983, at D6, col. 5. Therefore it is no longer valid to say, as TWA does at page 12 of its petition, that the "United States

⁵These protocols are reprinted in A. Lowenfeld, *Aviation Law, Documents Supplement* 985-1001 (2d ed. 1981).

⁶*In re Aircrash in Bali, Indonesia on April 22, 1974*, 684 F.2d 1301 (9th Cir. 1982); *In re Aircrash at Kimpo International Airport, Korea, on November 18 1980*, MDL-482 (C.D. Cal. Feb. 15, 1983). A copy of the latter decision is printed at pages A29-A35 of the Appendix to *Franklin Mint's* petition in No. 82-1465.

has given every indication via the Montreal Protocols that it continues to support a limitation,"

In addition, notwithstanding the suggestion of TWA at page 18 of its petition, the decision of the court of appeals does not contradict a clear agency interpretation of the Convention. The C.A.B.'s order number 74-1-16, 39 Fed. Reg. 1526 (1974), was promulgated at a time when there was an official price of gold. More recently the C.A.B. has stated in an order that "We do not by our statements in this order express any views of the appropriate valuation of 125,000 francs as expressed in terms of gold." Civil Aeronautics Board Order 81-3-143 (March 24, 1981).

Although TWA cites an internal C.A.B. memorandum in support of the airline's position, what that document actually shows is that the agency intends not to disturb the status quo pending its demise.

Because of the confusion inherent in converting Warsaw's limits when there is no official rate of gold and the equitable considerations raised by the low limits currently in force, we believe the Board should develop a coherent policy resolution of the questions, and then meet with the Department of Transportation and State to review this problem. These agencies will be solely responsible for enforcing Warsaw in the future and have participated actively in formulating U.S. policy in this area in the past. (J. Golden, Warsaw Convention Liability Limits (May 20, 1981) (unpublished memorandum by the Director of The Bureau of Compliance and Consumer Protection, Civil Aeronautics Board), page A-92 of the Appendix to TWA's petition.)

"It can also no longer be asserted, if it ever could, that the Second Circuit's decision violates Article 18 of the Vienna Convention of the Law of Treaties, 8 I.L.M. 679, 686 (1969). That provision requires a state "to refrain from acts which would defeat the object and purpose of a treaty . . . until it shall have made its intention clear not to become a party to the treaty". The Senate's action satisfied the qualification.

As the Second Circuit correctly pointed out: "The sole criterion supporting the C.A.B.'s position appears to be the law of inertia." *Franklin Mint Corp. v. Trans World Airlines, Inc.*, 690 F.2d 303, 310 (2d Cir. 1982).

Finally, and contrary to TWA's assertions, the court of appeals was correct in determining that there is "international disarray" on this subject. *Id.* at 309. Thus, some countries, such as Sweden, provide by domestic legislation a method by which to convert validly the Convention's gold franc into currency. Sweden's Aviation Act of 1957, Amendment to Article 22, Chapter 9, effective April 27, 1978. Other nations, such as the United Kingdom, have resolved the issue by agency order. United Kingdom's Carriage by Air (Sterling Equivalents) (No. 2) Order 1980, Statutory Instruments 1980 No. 1873. Still other countries, for example Argentina, have settled the matter by judicial decision. *Florencia, Cia Argentina de Seguros, S.A. v. Varig, S.A.*, Buenos Aires, Argentina, August 27, 1976 (National Court of Appeals) [1977] Uniform L. Rev. 198.

The judges in the various countries who have addressed the issue have reached varying results. The free-market price of gold has been used. *Cosida S.p.A. v. B.E.A.*, Milan Ct. of App., No. 2796/77 (June 9, 1981; Judgment No. 861). The last official price of gold has been used. *Pakistan International Airlines v. Compagnie Air Inter S.A.*, No. 79/2278, Court of Appeals of Aix-en-Provence, France (October 31, 1980). The Special Drawing Rights of the International Monetary Fund have been used. *Linee Aeree Italiane v. Riccioli*, Rome Civ. Ct. (November 14, 1978; Judgment 609/1979). The current French franc has also been utilized. *Chamie v. Egyptair*, Paris Ct. of Appeal (January 31, 1980).

The conclusion to be drawn, both on the question of Article 22 and as to the Warsaw Convention generally, was ably stated by a leading aviation lawyer "the Warsaw Convention has been revised and re-revised many times, both legally and extra

legally, with the result that the tangled network that is the Warsaw system comprising the original treaty and all its related instruments is a disgraceful shambles." B. Cheng, "Wilful Misconduct: From Warsaw to the Hague and from Brussels to Paris, 1977 *Annals of Air and Space Law* 55. In the absence of an amendment adhered to by all member nations, there is simply no way to achieve international uniformity on the question of liability limits.⁸ Because of the lack of international uniformity on the question, each nation has resolved the matter internally in accordance with its own constitutional structure.

Franklin Mint contends that the decision of the court of appeals makes sense, is constitutionally valid, and has been upheld by the recent action of the Senate. The appellate decision violates no settled agency interpretation of the Convention, conflicts with no other decision by a circuit court, and does not disturb any international consensus of opinion on the subject. Consequently, TWA's petition should be denied.⁹

POINT III

The motion by IATA for leave to intervene should be denied.

Intervention in proceedings before this Court "is a remedy seldom invoked and rarely granted." R. Stern & E. Gressman, *Supreme Court Practice* 436 (5th ed. 1978). "Only for the

⁸There certainly has been no groundswell to approve the Montreal Protocols. Article IX of Protocol No. 3, for instance, requires thirty nations to ratify that treaty before it goes into effect. So far, the only states to have done so are apparently Brazil and the Philippines. R. Maniewicz, *The Liability Regime of the International Air Carrier* 238-39 (1981).

⁹Franklin Mint's sole objection to the Second Circuit's opinion is that it held the Article 22 limit to be unenforceable only prospectively. In its petition Franklin Mint contends that the limit is unenforceable from 1 April 1978, the date when the United States eliminated the official price of gold.

most imperative of reasons and where one's interests may otherwise be lost will the Court entertain a motion to intervene in pending proceedings before the Court." *Id.* The unusual circumstances required for intervention are not present in the matter at hand.

TWA has been ably represented at all stages in this litigation. The district judge referred to TWA's memoranda on the disputed question as "extraordinarily lucid and comprehensive." *Franklin Mint Corp. v. Trans World Airlines, Inc.*, 525 F. Supp. 1288, 1289 (S.D.N.Y. 1981). TWA has vigorously asserted the rights of the airline industry, and there is no reason to believe that it will not continue to do so.

The fact that TWA is pursuing this matter immediately distinguishes this case from decisions cited by IATA such as *Banks v. Chicago Grain Trimmers*, 389 U.S. 813 (1967), 390 U.S. 459 (1968). In *Banks* the intervening petitioner was the real party in interest adversely affected by the lower appellate decision. Upon a showing that the party who was the nominal loser did not intend to seek certiorari, the non-party was permitted to intervene in order to file a petition. Likewise, in *Hunter v. Ohio ex rel. Miller*, 396 U.S. 879 (1969), a non-party, who was the real party in interest, was allowed to intervene and file a petition when the named losing party would not seek review. See R. Stern & E. Gressman, *Supreme Court Practice* 59, 1062 (5th ed. 1978).

IATA has filed an *amicus* brief in support of TWA's petition. If this petition is granted, then IATA's position can be easily protected by an *amicus* brief on the merits. Franklin Mint consented to IATA filing an *amicus* brief on the petition and has no objections to an IATA *amicus* brief on the merits. The Court should deny the request to intervene, but grant leave to file an *amicus* brief. See *Ohio Bureau of Employment Services v. Hodory*, 429 U.S. 814 (1976).

CONCLUSION

TWA's petition for a writ of certiorari should be denied.

Respectfully Submitted,

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Franklin Mint Limited
McGregor, Swire Air Services,
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WAESCHE, SHEINBAUM & O'REGAN, P.C.

Of Counsel

April 5, 1983

APPENDIX

Designation of Corporate Relationships

Franklin Mint Corporation, Franklin Mint Limited, and McGregor, Swire Air Services Limited, filing this brief in opposition as respondents in this proceeding, state that:

1. This is their original Designation of Corporate Relationships.

2. Franklin Mint Corporation is a subsidiary of Warner Communications, Inc.

3. Franklin Mint, Limited is a subsidiary of Warner Communications, Inc. (U.K.), which is in turn a subsidiary of Warner Communications, Inc.

4. McGregor, Swire Air Services Limited, presently known as McGregor Sea & Air Services, Ltd., is a subsidiary of Ocean Cory, Ltd., which is in turn a subsidiary of Ocean Transport & Trading plc.

5. Affiliates and subsidiaries of Franklin Mint Corporation and Franklin Mint, Limited are:

- Atari, Inc.
- Atlantic Records
- WEA Manufacturing
- Warner Bros.
- Panavision
- DC Comics
- Warner Cosmetics
- Warner Amex Cable Communication
- Knickerbocker Toy
- Elektra/Asylum/Nonesuch Records
- Warner Special Prods.
- Warner Bros. Television
- Warner Home Video
- Mad Magazine

Designation of Corporate Relationships

Cosmos Soccer
 Warner Amex Satellite Entertainment Co.
 Malibu Grand Prix
 Warner Bros. Records
 WEA International
 Warner Bros. Music Publishing
 Licencing Corp. of America
 Warner Books
 Warner Publisher Services
 Warner Theatre Prods.

6. Affiliates and subsidiaries of McGregor, Swire Air Services Limited are:

McGregor Uyeno K.K.
 Calayan Co., Ltd.
 McGregor Swire Air Services (Malaysia) Sdn. Bhd.
 G.E. Green & Co. Pty., Ltd.
 MSAS SRL
 Society Francaise Wm. Cory et Fils
 MSAS Transport GmbH

FEB 7 1983

ALEXANDER L. STEVENS,
CLERK

No. 82-1186

IN THE
Supreme Court of the United States

OCTOBER TERM, 1982

TRANS WORLD AIRLINES, INC.,

Petitioner,

v.

FRANKLIN MINT CORPORATION,

FRANKLIN MINT LIMITED, AND

MCGREGOR, SWIRE AIR SERVICES LIMITED,

Respondents.

**BRIEF OF AIR TRANSPORT ASSOCIATION
OF AMERICA AS AMICUS CURIAE
IN SUPPORT OF THE PETITION OF
TRANS WORLD AIRLINES, INC. FOR A
WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
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February 7, 1983

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IN THE
SUPREME COURT of the UNITED STATES
OCTOBER TERM, 1982

TRANS WORLD AIRLINES, INC.,
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FRANKLIN MINT CORPORATION,
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McGREGOR, SWIRE AIR SERVICES LIMITED,
Respondents.

BRIEF OF THE AIR TRANSPORT ASSOCIATION
OF AMERICA AS AMICUS CURIAE
IN SUPPORT OF THE PETITION OF
TRANS WORLD AIRLINES, INC. FOR A
WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

The Air Transport Association of
America ("ATA") as amicus curiae sup-
ports the Petition for a Writ of
Certiorari to the United States Court of
Appeals for the Second Circuit filed in

the above entitled proceeding by Trans World Airlines ("TWA") on January 15, 1983. Counsel for Petitioner and Respondents have given their written consent for ATA to file briefs in support of the petition and on the merits should the writ be granted.

I. INTEREST OF THE AMICUS CURIAE, AIR TRANSPORT ASSOCIATION OF AMERICA

ATA is a non-profit, unincorporated association comprised of federally licensed airlines.^{1/} Twenty-nine ATA

1/ The following airlines are members of ATA:

Air California, Air Canada, Air Florida, Inc., Alaska Airlines, Inc., Aloha Airlines, Inc., American Airlines, Inc., Best Airlines, Inc. Braniff International, Capitol Air, Inc., Continental Airlines., Inc., CP Air, Delta Air Lines, Inc., Eastern Air Lines, Inc., Evergreen

(Footnote Continued on Next Page)

member airlines provide scheduled domestic air transportation. Fifteen of them provide scheduled foreign air transportation to some 72 foreign countries.

Two of the Association's associate members, Air Canada and CP Air, are foreign air carriers engaged in international air transportation to many points in the world including 11 points in the United States. All of the ATA member airlines

1/ (Continued from Previous Page)

International Airlines, Inc., Federal Express Corporation, The Flying Tiger Line, Inc., Frontier Airlines, Inc., Hawaiian Airlines, Inc., Midway Airlines, Inc., Muse Air Corporation, Northwest Airlines, Inc., Ozark Air Lines, Inc., Pan American World Airways, Inc., Piedmont Airlines, PSA -Pacific Southwest Airlines, Republic Airlines, Inc., Trans World Airlines, Inc., United Airlines, Inc., USAir, Inc., Western Airlines, Inc., Wien Air Alaska, Inc.

provide transportation of passengers or cargo which is subject to the terms of the Convention for the Unification of certain Rules Relating to International Transportation by Air (the Warsaw Convention"). 2/

ATA's activities are governed by its Articles of Association. Among the objectives and purposes of ATA set forth in those Articles are:

To promote and develop the business of transporting goods and mail by aircraft between fixed termini, on regular schedules, and through special service, to the end that the best interests of the public and the members of the Association be served.

To advocate the enactment of just and proper laws governing the airline business.

2/ Refusal of the United States Court of Appeals for the Second Circuit to apply a key Article of that Convention prospectively is the issue presented in this case.

To improve the transportation service rendered by its members.

To cooperate with all public officials in securing the proper enforcement of all laws affecting air transportation.

In furtherance of these objects and purposes, to participate, in... proceedings before governmental agencies and courts.

In order to carry out these and other objectives and to fulfill its purposes, ATA, through its various offices and conferences, is involved in virtually all aspects of international aviation. Its representatives participate in meetings of international committees and diplomatic conferences concerned with the negotiation of treaties and international agreements affecting aviation, including those that govern the liability of airlines. ATA also participates in the development of: air carrier agreements and legislation

needed to implement treaties and execute agreements; international agreements relating to navigational and operating facilities for the purpose of promoting safety; route and traffic agreements and understandings with other nations; agreements for standardizing travel documents (cargo and passenger) and facilitating admission of passengers and cargo at ports of entry.

In performing these functions ATA representatives work closely with U. S. government officials of the Departments of State, Transportation and Treasury, representatives of the Federal Aviation Administration and the Civil Aeronautics Board and, from time to time, with other federal agencies to whose jurisdiction

various aspects of international air transportation are entrusted. In the case of the Warsaw Convention, ATA representatives have served as advisors to the United States delegations which have participated in a series of meetings of the Legal Committee (and Subcommittee) of the International Civil Aviation Organization ("ICAO") which have addressed a number of proposals for updating this half-century old treaty -- most of them put forth by the Executive Branch of the United States Government.

In particular, the United States delegations to which ATA representatives have served as advisors, have devoted considerable effort and time in the past 17 years to reviewing and revising the liability provisions of the Warsaw Convention. At the Diplomatic Conference

held in Guatemala City, Guatemala, in 1971, the substantive provisions of the Warsaw Convention were comprehensively revised as to passengers. At the Diplomatic Conference in Montreal, Article 22 of the Convention was amended to replace the so-called Poincare franc with the Special Drawing Right ("SDR") of the International Monetary Fund ("IMF") as the unit of account for expressing the limitation on the level of damages that may be recovered in liability cases (passenger and cargo) subject to the Convention. That Conference also readopted the substantive provisions of the Guatemala Protocol 3/ which govern

3/ The Guatemala City Protocol, reprinted in A. Lowenfeld, Aviation Law, Documents Supplement at 975-984 (2d ed. 1981)

the passenger regime (Montreal Protocol 3), modernized the documentation requirements of the cargo regime (Montreal Protocol 4) and introduced strict liability principles while leaving the liability level of the latter regime unchanged. ^{4/}

ATA's involvement in these proceedings evidences its deep interest in the international aspects of air transportation, and gives it a perspective going beyond the narrow question of what the recovery of the Franklin Mint should be in the case at hand. ATA is concerned about the impact that the refusal of the Second Circuit to apply Article 22 of the Convention

^{4/} Montreal Protocols No. 3 and No. 4 (1975), reprinted in A. Lowenfeld, Aviation Law, Documents Supplement at 985-1001 (2d ed. 1981).

and its limitation on cargo damages in future cases will have on all of its air carrier members, including those who were not before the court in the Franklin Mint case. It is equally concerned with the future of the Convention itself -- whether or not any of the Convention's articles or regimes can survive a refusal by the courts of the world's most important aviation nation to apply one of the Convention's most critical Articles. ^{5/} Finally, is concerned about the impact that abrogation of a key provision of Warsaw by

^{5/} See Lowenfeld and Mendelsohn, THE UNITED STATES AND THE WARSAW CONVENTION, 80 Harv. L.R., p. 135; and Boyle, THE GUATEMALA PROTOCOL TO THE WARSAW CONVENTION, 6 Calif. Western International L.J., p. 41. (Hereinafter the Lowenfeld and Mendelsohn article will be cited as "Lowenfeld and Mendelsohn" and the Boyle Article as "Boyle.")

the Judicial Branch of the U. S. Government would have on other international agreements and conventions critical to the safe and orderly future development of international civil aviation.

aviation. 6/

II. ARGUMENT

- A. THE WARSAW CONVENTION TO WHICH THE UNITED STATES ADHERED AND PLEDGED SUPPORT IN 1934, IS A COMPREHENSIVE TREATY WHICH PRESCRIBES RULES OF INTERNATIONAL CARRIAGE BY AIR AND ESTABLISHES A LIABILITY REGIME FOR CARGO AND PASSENGERS.

The Warsaw Convention is a treaty comprised of a number of interdependent provisions. Insofar as it pertains to cargo, the subject matter involved in the instant case, it establishes uniform

6/ See Preamble, Convention on International Civil Aviation, (opened for signature, Dec. 7, 1944) 61 Stat. 1180. T.I.A.S. No. 1591, 1591, 15 U.N.T.S. 295.

documentation requirements which protect both shippers and airlines from a plethora of local requirements around the world. In the absence of these provisions, both shippers and airlines would be uncertain as to whether the documents reflecting their commercial transactions would run afoul of one or more of those local requirements. ^{7/} Articles 3 and 11 were adopted to avoid such a possibility. In addition to providing the protections just mentioned the articles dealing with documentation have permitted the development of airline agreements which make it possible to ship cargo anywhere in the world on a single air waybill.

^{7/} See C. Shawcross and K. Beaumont, AIR LAW, Sec. 40, n(e), p. 71 (2d ed., 1951).

With a few exceptions, the Convention makes carriers liable for loss, damage, destruction or delay of cargo by creating a rebuttable presumption (Article 18), and specifies the jurisdictions within which claims may be prosecuted (Article 28). These provisions are also regarded by many of the participating nations as extremely important because they limit significantly the maze of conflicting legal theories of liability and conflicts of laws problems that otherwise would have to be dealt with on an ad hoc basis by courts of nations with different legal systems.

As a complement to the foregoing cargo regime, the passenger regime also establishes a rebuttable presumption of carrier liability (Articles 17 and 19),

sets forth ticketing and baggage check requirements that must be met (Articles 3 and 4), sets uniform limits of carrier liability except under very limited circumstances (Articles 22 and 25), and designates jurisdictions within which claims may be brought (Article 28).

In order to assure that the treaty is kept intact as a whole instrument comprised of interdependent provisions, the Convention's reservation clause is very restrictive, authorizing a reservation by a sovereign party only in the case of "international transportation by air performed directly by the state." 8/

8/ See Additional Protocol With Reference to Article 2. 49 Stat. 3025.

This reservation clause is also looked to by most of the participating nations as a guarantee that none of the participants will attempt to abrogate the limitations on liability.

- B. THE UNITED STATES GOVERNMENT HAS PLAYED A MAJOR ROLE IN REFINING THE CONVENTION SINCE BECOMING AN ADHERENT AND HAS BEEN THE DOMINANT FORCE BEHIND EFFORTS TO MAKE MODERNIZING REVISIONS. BY DOING SO IT HAS FURTHER STRENGTHENED THE WORLD WIDE UNDERSTANDING THAT THE UNITED STATES WILL CONTINUE TO OBSERVE ALL ELEMENTS OF THE CONVENTION, INCLUDING THE ARTICLE 22 LIMITATION OF LIABILITY.

The United States was not a prime mover in fashioning the Warsaw Convention. However, it did play a significant role in formulating the

Hague Protocol. 9/ The United States did not ratify that Protocol because the Executive Branch believed that further changes in the passenger regime were needed to provide greater benefits for claimants and to bring the Protocol more in line with American standards insofar as the limitation of liability in passenger cases was concerned. 10/ Since the limits applicable in cargo cases were in reasonable accord with the domestic experience, the chief emphasis

9/ See Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw on 12 October 1929, done at the Hague, Sept. 28, 1955, 478 U.N.T.S. 371. Calkins, HIKING THE LIMITS OF LIABILITY AT THE HAGUE, PROCEEDINGS OF THE AM. SOC'Y OF INT'L L. 120, 124 (1962); Lowenfeld and Mendelsohn, p. 532; and Boyle p. 42.

10/ Lowenfeld and Mendelsohn, p. 533, 552.

of the United States has been on streamlining the documentation requirements of that regime and introducing the concept of strict liability to transportation treaty law.

With these objectives in mind, for the past 17 years, the United States Executive Branch has driven a hard bargain with its treaty partners in updating the Convention along lines favorable to the United States and its citizens. As a part of this effort, the United States, under President Johnson, served notice of denunciation of the Convention because of dissatisfaction with the low limitation of liability in passenger cases, and as a tactic for achieving its goals. ^{11/} However, in

^{11/} Lowenfeld and Mendelsohn, p. 497.

taking that step, the United States stated that the notice of denunciation would be rescinded if there were a "reasonable prospect" of an international accord increasing the passenger limit to a level "in the area of \$100,000"; and if a provisional arrangement among the principal international airlines flying to and from the United States, waiving the passenger limit up to US\$75,000 and waiving the carriers' right to rebut the presumption of liability, could be achieved. 12 / When, in accordance with Article 22(1) an interim airline

12/ 50 DEPT. STATE BULL. 923,24 (1965);
54 DEPT STATE BULL. 580 (1966); and
2 Montreal Proceedings 174-78.

agreement 13/ ("Montreal Agreement") was reached, waiving the limit up to US\$75,000 and the carrier defenses set forth in Article 20(1), the United States withdrew its denunciation and began the lengthy process of negotiating revisions to the Convention along the lines mentioned above. This was undertaken within the framework of ICAO and meetings of appropriate ICAO committees, which are comprised of a cross section of the nations of the international aviation community.

Among other things, the changes in the passenger regime sought by the

13/ Agreement Relating to Liability Limitations of the Warsaw Convention and the Hague Protocol. This Agreement, CAB 18900, was approved by the Civil Aeronautics Board on May 13, 1966. 44 CAB Rept 819 (1966) See Boyle, pp 45-49.

United States as a result of these negotiations included: making carriers liable without regard to fault; increasing the limitation on recoverable damages from US\$8,300 to US\$100,000; adding a provision to induce settlements of claims subject to the Convention; revising the jurisdiction article virtually to assure all American claimants that an action could be brought before an American court; and recognizing the right of each party to the Convention to supplement recoveries within its own territory. ^{14/}

These proposed changes were strongly resisted within the international community, and there were many charges of insensitivity on the

¹⁴ / See Boyle, pp.49-56.

part of the United States to the plight of less fortunate nations. For the most part, these objections came from smaller, less developed nations. There were, however, objections raised by some of the fully developed nations whose social systems depend less upon litigation as a means of providing for surviving dependents or making recompense to injured parties, than is the case in the United States. 15/

Throughout these negotiations, the United States held out the threat of denunciation if other nations did not go

15/ Questions were raised by such diverse delegations as those of Sweden and Switzerland on the one hand and Nigeria on the other. I Montreal Proceedings 925, 28. The Nigerian delegate raised the rhetorical question "why should the peasant pay for the comfort of the king?" Id. at 9.

along with its objectives, most particularly the proposed increases in potential recoveries. Objectionable as the increases were to some of the parties, the prospect of no limit at all in the case of flights to and from the United States was even worse in their eyes. Thus, with very few compromises, the United States prevailed and a protocol embracing nearly all of its objectives in the case of the passenger regime was opened for signature and signed by the United States at Guatemala City in 1971. That Protocol was known as the Guatemala Protocol but, as noted above, has been subsumed by Montreal Protocol 3.

All of the negotiations and discussions regarding the increased level of the limits were conducted in terms of United States dollars, and the

dollar amount was converted into Poincare francs when treaty language was drafted. This was done in order to leave the unit of account established by the original Convention undisturbed, primarily because of its historic usage and the longstanding commitment to a "gold clause" by some parties to the treaty.

The United States later took the leading role in triggering a change in the unit of account from the Poincare franc to the SDR, at the Montreal Conference of 1975. This action, reflected in both Montreal Protocols 3 and 4, was taken in anticipation of

action by the international community demonetizing gold. 16/

There was no doubt throughout the negotiations described above that the United States was the driving force behind the revisions to the Convention embodied in the Montreal Protocols which are now pending before the United States Senate. Nor is there any question that other nations went along in the face of threatened withdrawal of the United States from the Convention. They went along to assure that there would be a limit.

16/ In the United States, gold was demonitized by repeal of the Par Value Modification Act. See Par Value Modification Act, Pub. L. No. 92-268, 86 Stat. 116 (1972), amended by Par Value Modification Act, 31 U.S.C. repealed by Pub. L. No. 94-564, Stat. 2660.

- C. THE CONVENTION ESTABLISHES A LIMITATION ON RECOVERABLE DAMAGES IN THE CASE OF CARGO AND PASSENGERS. THE PARTIES TO THE CONVENTION INTENDED TO HAVE SUCH A LIMIT AS FURTHER ATTESTED BY THE FACT THAT ALL PROTOCOLS TO THE CONVENTION AND THE INTERIM MONTREAL AGREEMENT HAVE INCLUDED SUCH A PROVISION, THUS UNDERSCORING THE INTENT OF THE PARTIES TO MAINTAIN SUCH A LIMIT. THE COURTS MUST CONSTRUE TREATIES LIBERALLY TO HONOR THIS INTENT.

The plain words of Article 22 of the Warsaw Convention make it clear that the Convention limits recovery. The intent to do so is equally clear. It is the function of courts in interpreting treaties to determine that intent and to respect it -- to "strive to construct their words to give them a meaning consistent with ... genuine shared expectations." Eck v. United Arab Airlines, Inc, 360 F.2d 804, 812 (2nd Cir. 1966) and Day v. Trans World

Airlines, Inc., 528 F.2d 31, 35 (2d Cir. 1975).

Courts are also required to construe treaties liberally to effectuate the intent of the parties. In Nielsen v. Johnson, 279 U.S. 47 (1929) this court held that a treaty between the United States and Denmark prevented the State of Iowa from imposing an inheritance tax on a nonresident alien who was heir to the estate of a resident alien of Iowa. The following observations concerning the principles of treaty construction are instructive:

"The narrow and restricted interpretation of the treaty contended for by respondent, while permissible and often necessary in construing two statutes of the same legislative body in order to give effect to both so far as is reasonably possible, is not consonant with the principles which

are controlling in the interpretation of treaties. Treaties are to be liberally construed so as to effect the apparent intention of the parties...."

* * *

"When their meaning is uncertain, recourse may be had to the negotiations and diplomatic correspondence of the contracting parties relating to the subject matter and to their own practical construction of it." 279 U.S. 51, 52. (Underscoring added; Court's citations omitted.)

It is respectfully submitted that the court below made no effort to follow this principle in its disposition of the claim of Franklin Mint.

A mere recitation of the reactions of other parties to U.S. efforts leading to negotiation of the Montreal Protocols leaves no room for doubting that the parties to the Convention, including the United States Government, intended Article 22 to limit recoveries

in the case of cargo and passengers -- and expect that it will continue to do so. But if doubt persists, it should be dispelled by the consistent course of action by the parties to Warsaw subsequent to adopting the original Convention. "The conduct of the parties subsequent to ratification of a treaty may, thus, be relevant in ascertaining the proper construction to accord the treaty's various provisions."

Day v. TWA, 528 F.2d at 35. See Pigeon River Improvement Slide and Boom Co. v. Charles W. Cox, Ltd., Cox, 291, U.S. 138, 558-63 (1934).

That consistent course of action began with negotiation of the Hague Protocol of 1955 which doubled the limit in the case of passengers -- but retained a limit. The Monteval Agreement

insisted upon by the United States retains a limit (\$US75,000). At no time during the proceedings at Guatemala City was there any suggestion of abolishing the limit. Indeed, in the case of the passenger regime, the new Protocol made it clear that the limit may not be exceeded under the limited circumstances permitted by the original Convention.

17/

Further testimony to the resolute intent of the parties to the Convention to limit recoveries is the action changing the unit of account, taken at the 1975 Montreal Diplomatic Conference -- again at the behest of the United

17/ ICAO Doc. 9040-LC/167-1 (Sept. 21, 1973). See Boyle, pp. 54, 66 and 67; and Lowenfeld and Mendelsohn, p. 557.

States 18/ . This action reflects a preference for the SDR as an easily convertible unit of account for the long term. 19/ It again reflects an intent to retain a limit. Cf. Franklin Mint v. TWA, 690 F.2d 308, 311.

18/ The role played by the United States in bringing about the Montreal Conference and pushing for the change of the unit of account is described in the Report of the U.S. Delegation:

"The U. S. initially drew attention to the SDR as a possible replacement for the Poincare franc in cables circulated to various foreign capitals, and thereafter recommended a proposal in an Appendix to the Report of the Special Working Group held in Montreal in April 1975 in

(Footnote continued on next page)

19/ Moreover, it demonstrates that the parties wanted to take no chance (Footnote Continued on Next Page) that the franc would be converted on the basis of the free market value of gold since doing so would preclude any semblance of stability.

Having been the moving force behind virtually all of the revisions that Montreal Protocols 3 and 4 would make in the Convention, including the change to

preparation for the Montreal Diplomatic Conference. As a result of the U. S. efforts and discussions at a meeting of the European Civil Aviation Conference in June, 1975, Norway introduced a formal proposal for adoption of appropriate protocols substituting the SDR for the Poincare franc in the Convention and for an appropriate amendment to the Conference agenda to permit discussion of the subject. The advance circulation of these materials and the general familiarity with the problem in the Finance Ministries of all countries parties to the IMF resulted in overwhelming support for adoption of the SDR. The only opposition was from East European countries which have not joined the IMF." Detailed Report of the U. S. Delegation on International Conference on Air Law held under the auspices of the International Civil Aviation Organization, Montreal, September, 1975, p. 17.

the SDR as the unit of account, and a signatory to those Protocols at the Montreal Diplomatic Conference, it seems axiomatic that the U.S. should take no steps through any branch of its government that would signal abandonment of the underlying Convention. And, of course, the Executive Branch, upon which the conduct of foreign policy devolves, has not taken such steps. Nor has the legislative branch, which has yet to act on the Executive's request for advice and consent to ratification of the Protocols. Yet the decision in Franklin Mint, if it is allowed to stand, would do just that.

In this connection, the Vienna Convention on the Law of Treaties [8 I.L.M. 679, 686 (1969)] includes an Article, Article 18, specifically

requiring states which have signed a treaty to "refrain from acts which would defeat the object and purpose of [that] treaty. . . ." Ibid. The United States has not ratified the Vienna Convention; however, as Secretary of State Rogers wrote President Nixon in urging its transmittal to the Senate, "[a]lthough not yet in force, the Convention is already generally recognized as the authoritative guide to current treaty law practice." S.Exec. Doc.L.92d Cong., 1st Sess. The Secretary's observation is corroborated by many federal court decisions referring to other aspects of the Vienna Convention. See, e.g., Weinberger v. Rossi ,50 U.S.L.W. 4354, 4355 n.5 (U.S. March 31, 1982), reversed and remanded 642 F.2d 553 (D.C. Cir.1980); Greater Tampa Chamber

of Commerce v. Goldschmidt, 627 F.2d 258, 263 n.4 (D.C.Cir.1980); and Husserl v. Swiss Air Transport Co., 351 F.Supp.702, 707 (s.D.N.Y. 1972), aff'd per curiam, 485 F.2d 1240(2d Cir.1973.

In the case at hand, the United States has signed (but not yet ratified) the Montreal Protocols. If the decision of the court below stands, the United States will have taken an action which defeats a fundamental object and purpose of those Protocols -- maintenance of a limit of liability in international air transportation.

- D. REPEAL OF THE PAR VALUE MODIFICATION ACT DOES NOT ABROGATE ANY ARTICLE OF THE WARSAW CONVENTION AND DOES NOT MEAN THAT DAMAGES EXPRESSED IN POINCARÉ FRANCS CANNOT BE CONVERTED INTO LOCAL CURRENCIES WITHOUT JUDICIAL INVOLVEMENT IN TREATY MAKING.

The decision of the Second Circuit holding Article 22 of the Convention unenforceable seems grounded almost exclusively on the action of Congress repealing the Par Value Modification Act, thus abolishing the official price of gold in the United States. Although the court's opinion acknowledges that "Congress may not have focused explicitly upon the Convention in repealing that Act. . . ." (Franklin Mint v. TWA, 690 F.2d 303, 309), it goes on to conclude that the purpose of repealing the Act "plainly encompasses [abrogation of the] use of that price to convert judgments into United States currency values." Ibid.

In order to sustain the action of the court below in refusing to apply the limits, this Court must conclude either:

(a) that Congress itself has abrogated a critical provision of the Convention sub silentio, which this Court's decision in United States v. Lee Yen Tai 20/ 185 U.S. 213, 221-22 (1902) counsels is not permissible; or (b) that the Court below was itself justified in ignoring the Convention limits because of its conclusion that Congress believed

20/ In Lee Yen Tai this Court said:
 "Nevertheless, the purpose by statute to abrogate a treaty or any designated part of a treaty, or the purpose by treaty to supersede the whole or a part of an act of Congress, must not be lightly assumed, but must appear clearly and distinctly from the words used in the statute or in the treaty." 185 U.S. 222. (Underscoring added). See Pigeon River Improvement, Slide and Boom Co. v. Charles W. Cox, Ltd., 291 U.S. 138 16 (1934); Menominee Tribe of Indians v. United States, 391 412-13 (1968); Washington v. Washington State Commercial-Passenger Fishing Vessel Assoc. 443 U.S. 658, 690 (1979).

the official price of gold "was out of touch with economic reality" (690 F.2d 309, 311), an incursion into the prerogatives of the Executive and Legislative Branches of Government proscribed by the Separation of Powers doctrine. This Court in Clark v. Braden, supra , recognized this constitutional prohibition, stating:

"The treaty is therefore a law made by the proper authority, and the courts of justice have no right to annul or disregard any of its provisions, unless they violate the Constitution of the United States. It is their duty to interpret it and administer it according to its terms. 57 U.S. (116 How.) 635."

It is true that circumstances have changed in recent years regarding the role of gold as a unit of account, but that does not relieve any nation which is a party to the treaty of the obligation to observe the limits set in

the Convention. The repeal of the Par Value Modification Act does not mean that there is no way in which Poincare francs can be converted into local currencies.

We shall not belabor the argument lucidly made by TWA, in justifying the use of the last official value of gold or the SDR as a basis for converting the existing unit of account into dollars. 21 / We would emphasize, however, in support of using the last official value as the basis for conversion, that the Civil Aeronautics Board, an instrument of the U.S. Government, ordered all airlines to file tariffs making the conversion on that basis (CAB Order 74-1-16, dated January 3, 1974). Those

21 See TWA Petition for a Writ of Certiorari, pp. 15-18 (last official value) and pp. 18-22 (SDR's).

mandated tariffs, such as the underlying TWA tariff in the instant case, are fully consistent with the Convention and the resolute intent of the parties to the Convention. As such consistent reflections of a prevailing treaty, they are binding on international air shippers. 22 /

Regarding the use of SDR's, we respectfully submit that TWA's explanation of how the necessary computations needed to make the conversion on that basis is to the point and persuasive. As TWA pointed out,

22 Adams Express Co. v. Croninger, 226 U.S.491 (1913); Boston & Maine R.R. v. Hooker, 233 U.S.97 (1914); Herman v. Northwest Airlines, Inc., 222 F.2d 326 (2d Cir.), cert. denied, 350 U.S. 843 (1955); Vogelsang v. Delta Air Lines, Inc. 302 F.2d 709 (2d Cir. 1962); and Tishman & Lipp, Inc. v. Delta Air Lines, Inc., 413 F.2d 1401 (2d Cir. 1969).

this can be accomplished without involving the Court in treaty making -- without the court's having to determine what the limits should be.

In this connection, it is noteworthy that the courts of other signatory parties to the Convention, mindful of their commitments under the treaty, have not found the task insurmountable. 23 / Nor, for that matter, have other courts in the United States. 24/

23/ Courts in the Netherlands and Italy have made the conversion on the basis of SDRs. basis of SDRs. State of the Netherlands v. Giant Shipping Corp., Rechtspraak van De Week, 301, (Supreme Court of the Netherlands, May 1, 1981); Linee Aeree Italiane v. Riccioli (Rome Civil Court Judgment 609/1979, Nov. 14, 1978).

24/ The following decisions by U. S. District Courts have used the last official value of gold as the basis

(Footnote Continued on Next Page)

Should this Court decline to review the case at hand, the Convention limits will have been abrogated insofar as future cargo cases brought within the Second Circuit are concerned. And surely that refusal will be urged by litigants as dispositive of the issues involved in the Fifth Circuit where an

for converting the Poincare franc into U.S. dollars: Franklin Mint, Corp., v. Trans World Airlines, Inc., 525 F. Supp. 1288 (S.D.N.Y. 1981); In Re Air Crash Disaster at Warsaw, Poland on March 14, 1980, 535 F. Supp. 833 (E.D.N.Y. 1982); Electronic Memories & Magnetics Corp. v. The Flying Tiger Line, Inc. Index No. 784512 (Cal. Super.Ct., San Fr., Deutsche Luftnansa AG, Index No. 81 N.D.Ill.1982. Cf. Boehringer Mannheim Diagnostics, Inc. v. Pan American World Airways, Inc., 531 F. Supp. 344 (S.D. Tex. 1981,) appeal docketed, No. 81-2519 (5th Cir. Dec. 24, 1981) using the free market value as the basis for conversion.

appeal of a District Court decision converting on the basis of the free market value is pending, and in the Seventh Circuit, should the decision of the U.S. District Court for the Northern District of Illinois using the last official value of gold be appealed. The latter case was decided by that District Court subsequent to the decision in Franklin Mint, and explicitly considered and rejected the Franklin Mint reasoning.

- E. IF THE DECISION BELOW REFUSING TO APPLY A CRITICAL ARTICLE OF THE CONVENTION IS UPHELD, THE UNITED STATES WILL HAVE FAILED TO HONOR ITS COMMITMENT TO OTHER NATIONS AND MAY HAVE SERIOUSLY JEOPARDIZED A WIDELY SUBSCRIBED AND BENEFICIAL TREATY AS WELL AS ITS OWN LEADERSHIP ROLE IN INTERNATIONAL AVIATION. IF THOSE RISKS ARE TO BE TAKEN ON OTHER THAN CONSTITUTIONAL GROUNDS, THE EXECUTIVE AND LEGISLATIVE BRANCHES OF GOVERNMENT MUST MAKE THAT DECISION.

Respect for this nation's international commitments is part of the American heritage. Few of its citizens are indulgent of foreign nations perceived to take their international commitments lightly -- to regard treaties and other agreements as proverbial scraps of paper or to "split legal hairs" to avoid their commitments.

Not only can disregard of international agreements impact adversely on private citizens of the nations which are parties to such agreements, it can weigh heavily upon the standing in the world community of a nation that does so. These observations, applicable to actions taken by other branches of the United States Government, apply with special

force to the Judicial Branch where treaties are involved. Whether to ratify or denounce a treaty is a political decision which is not suited for judicial determination. ²⁵ / For this reason, Article 2 of Section 2, Clause 2 of the Constitution leaves the treaty making power to the Executive Branch of government with the advice and consent of the Senate.

As previously set forth, the United States played no role in developing the original Convention. However, its

25/ This Court has recognized "...that the power to determine these matters had not been confided to the judiciary, which has no suitable means to exercise it, but to the Executive and Legislative Departments of our government; and that they belong to diplomacy and legislation, and not to the administration of laws...." Whitney v. Robertson , 124 U.S. 190 (1888). See Taylor v. Morton , 2 Curtis 454, 459, relied upon in Whitney .

instrument of adherence in 1934 pledged to observe that Convention in good faith. These words from the Proclamation of Adherence are worthy of note:

"Now, therefore, be it known that I, Franklin D. Roosevelt, President of the United States of America, have caused the said convention and additional protocol to be made public to the end that the same and every article and clause thereof may be observed and fulfilled with good faith by the United States of America and the citizens thereof, subject to the reservation ^{26/} aforesaid." Proclamation of President Franklin D. Roosevelt declaring U.S. adherence to the Warsaw Convention. 49 Stat. 3000, T.S. 876 (1934); (underscoring additional)

26/ The reservation referred to in the proclamation of adherence is that the Convention will not apply to international transportation performed by the United States government. If the action of the court below is viewed as a reservation it is faulty on two scores: the court is not empowered to make such a reservation and, even if it were, the reservation is not permitted.

If Franklin Mint is followed and becomes the law of the land, there is a good chance that many parties to the Convention, some of whom have expressed impatience with the pace of the ratification of the Montreal Protocols by their principal author,-- the United States, might regard the decision as having the same practical effect of as withdrawal from the entire Convention by the United States. To many of them an enforceable Article 22 is the sine quo no to their own participation and it is doubtful that they would take much comfort in the fact that the decision is by its terms limited to the disposition of future cargo claims.

Again, provisions of the Vienna Convention on the Law of Treaties (8 I.L.M.679) are instructive. Article

60(2) provides that "a material breach of a multilateral treaty by one of the parties" entitles: a) the other parties collectively to suspend operation of the treaty or terminate it vis a vis the defaulting State or between all parties, or (b) an individual party to suspend the treaty's operation vis a vis the defaulting state or every party.

Article 60(3) defines "the violation of a provision essential to the accomplishment of the object or purpose of the treaty" as a material breach.

Article 22 of Warsaw, establishing the limits on liability, is just such a provision. Some of the participating nations whose airlines are owned and operated by the government may well be tempted to return to the extremely low limits imposed by their own local laws

-- limits which may be adequate to cover most of their own citizens, but far less than the level believed essential for American passengers and shippers by the U.S. Government. In short, since the Convention, as interpreted in Franklin Mint, would not fulfill their expectations of limiting liability in American courts, some nations would have little reason to continue to abide by the Convention.

Of course, no one can be sure that there will be immediate and massive withdrawals from, or suspensions of the Convention if Franklin Mint is allowed to stand. But, as previously suggested, there is at least a fair prospect that support for the Convention will erode if Article 22 is not enforceable in the

courts of the most important aviation country.

If suspensions and terminations were to result, fewer cases could be brought in American courts. This would be a significant loss for American travelers and shippers whose claims are against connecting airlines, or other airlines which do not fly to the United States. In such cases, American citizens would face the possibility of having to bring their claims in a faraway, foreign court or of having their recoveries severely limited by foreign law even if they succeed in establishing jurisdiction in an American court. 27/

27 A good example is Tramontana v. Varig, 350 F.2d 468 (D.C. Cir. 1965), a non-Warsaw case, where

American flag carriers would also be subject to the vicissitudes and uncertainties of foreign law in more instances than is presently the case. In short, travelers, shippers and the nation's flag carriers would have to cope with a maze of widely differing legal systems and philosophies of recompense, if the Convention ceases to be a viable treaty.

The Executive and Legislative Branches of the U.S. Government have recognized the importance to American citizens and American flag airlines, of guarding against these contingencies. This is manifested by U.S. adherence to

under Brazilian law the recovery of the surviving wife of a member of the United States Navy Band was limited to \$170, even though the case was tried in the federal court in Washington, D.C.

the Convention and the U.S. leadership role in updating the Convention through the Montreal Protocols. The court below while eschewing the idea of engaging in treaty making, did just that when it declared Article 22 prospectively unenforceable in American Courts in the case of cargo claims. In doing so, it has placed in jeopardy the objectives of the Executive branch of our Government.

Apart from the potential impact on air carriers and the customers who use their services, the credibility of the United States as a leader in the international aviation world will inevitably suffer if the Convention is not enforced by American courts. It was the United States which drove a hard bargain to secure the acceptance of changes in the Convention primarily for

the benefit of its own citizens. In making concessions, sometimes painful ones, to the United States in order to preserve the Convention, this country's negotiating partners throughout the preparatory meetings at ICAO and at the Guatemala and Montreal Conferences were led to believe that the United States would stand by Article 22 which imposes limits on the damages that might be recovered. The Franklin Mint decision casts doubt upon that commitment. Any nation believed by its treaty partners to have disregarded its treaty obligations, for whatever reason, will surely place its future credibility at risk, and may well have mortgaged its leadership role in developing other critical international agreements.

III. CONCLUSION

The decision of the court below refusing to enforce a critical provision of the world's most widely subscribed private law treaty is tantamount to an abrogation of Article 22 of that treaty, or a prohibited reservation to that treaty. Such action is in contravention of the separation of powers contemplated by the U.S. Constitution; is at odds with the principles of treaty construction as enunciated by decisions of this Court; and will frustrate the long-standing objective of the Executive Branch of the U.S. Government to update the Convention.

The action of the court below should not be permitted to stand without review by this Court. Accordingly, TWA's Petition for a Writ of Certiorari should be granted.

IV. SUMMARY OF ARGUMENT

The Warsaw Convention prescribes rules governing international carriage by air, including related documentation. The treaty also establishes uniform rules of liability; specifies jurisdictions in which actions may be brought against air carriers; and places uniform limitations on recoveries.

The United States adhered to the Convention in 1934 and pledged to observe "every article and clause" of it with a single reservation not relevant in the instant case.

Since it became an adherent, the United States has been actively engaged in efforts to modernize the treaty. Although the United States has pushed for significantly higher limits in the

case of passengers, and has secured the consent of most of its treaty partners to such an increase, it has continued to support Article 22 which imposes limitations in the case of both passenger and cargo claims.

It is not a judicial prerogative to abrogate a treaty on nonconstitutional grounds. Clark v. Braden , 57 US (116 How.) 635. Rather it is the duty of American courts, as enunciated by this Court in Nielsen v. Johnson 279 U.S. 41, to interpret treaties liberally "so as to effect the apparent intention of the parties." The intention of the parties may be gleaned from their deliberations in negotiating treaties, and from their actions subsequent to adoption of a treaty.

It is clear from the consistent course of action by the parties to the Warsaw Convention since its adoption that they intend to retain the limitations imposed by Article 22. The Hague Protocol of 1955 retained the limitation provisions, as did the interim airline arrangement adopted at the insistence of the U.S. Government, the Montreal Agreement of 1966. The Guatemala Protocol, opened for signature in 1971, contains a limitation on recoveries in the case of passengers; and Montreal Protocols 3 and 4, adopted in 1975, continue to specify limits in the case of both passengers and cargo. The action of the Montreal Conference in replacing the Poincare franc with the

SDR was taken to protect the integrity of the limits imposed by Article 22. Finally, the transmittal of the Montreal Protocols to the Senate for its advice and consent reveals the intent of the Executive Branch of the American Government to retain a limitation.

The court below erred in concluding that Congress by abolishing the official price of gold has rendered the treaty unenforceable. Such a conclusion is not permissible under decisions of this Court holding that abrogation of a treaty provision by Congress "must appear clearly and distinctly from the words used in the statute or in the treaty." U.S. v. Lee Yen Tai, 185 U.S . 221-22.

In repealing the Par Value Modification Act, thus abolishing the official price of gold, Congress made no mention of the Convention and, as the Court below acknowledged, "may not have focused explicitly on the Convention."

Franklin Mint v. TWA , 690 F.2d
303, 309, 311.

The court below erred in concluding that it could not convert the Poincare franc into dollars without engaging in treaty making. There is a sound basis for using either the last official price of gold, as embodied in airline tariffs mandated by the Civil Aeronautics Board, or the SDR, which was substituted for the Poincare franc in the Montreal Protocols at the behest of the U.S. government.

If Article 22 is not enforced in American courts the United States may well be perceived as having dishonored its pledge to observe the treaty, and as having misled other nations who reluctantly agreed to higher limits in developing amendments to the treaty, in the belief that it would assure retention of the limits. Since many nations regard Article 22 as the sine qua non of their participation, the decision of the court below might well lead to an erosion of the Convention to the detriment of American passengers and ship-pers, as well as its flag carriers.

The perception of the United States as an unreliable treaty partner could also prejudice the leadership role of the United States, vital to other important international aviation agreements.

If these risks are to be taken, the Executive and Legislative Branches of Government, and not the Judicial Branch, should make that decision.

Respectfully submitted,

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No. 82-1186

IN THE
Supreme Court of the United States

OCTOBER TERM, 1982

TRANS WORLD AIRLINES, INC.,
Petitioner,
v.

FRANKLIN MINT CORPORATION, FRANKLIN MINT
LIMITED and MCGREGOR, SWIRE AIR SERVICES LIMITED,
Respondents,

INTERNATIONAL AIR TRANSPORT ASSOCIATION AND
FORTY-THREE OF ITS MEMBER AIRLINES (SEE APPENDIX I),
Potential Intervenors.

PETITION FOR LEAVE TO INTERVENE IN
TRANS WORLD AIRLINES, INC. v.
FRANKLIN MINT CORP., NO. 82-1186 AND
PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
SECOND CIRCUIT OR, IN THE ALTERNATIVE,
BRIEF OF *AMICUS CURIAE* IN SUPPORT OF
PETITION FOR WRIT OF CERTIORARI OF
TRANS WORLD AIRLINES, INC.

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Appendix I)

January 20, 1983

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QUESTION PRESENTED

Whether a decision of the U.S. Court of Appeals for the Second Circuit holding on non-constitutional grounds that the cargo liability limitation of Article 22 of the Warsaw Convention, a Treaty of the United States, is prospectively unenforceable in United States courts is a violation of the separation of powers doctrine derived from U.S. Const. art. II, § 2, cl.2 where

- (a) no Act of Congress specifically abrogated the United States' adherence to the Convention and neither Congress nor the Executive Branch has expressed any need for a Treaty reservation; and
- (b) the decision of the Court of Appeals intrudes upon the ongoing process of Executive and Legislative Branch negotiation and ratification of amendments to the Treaty.*

* Franklin Mint Corporation, Franklin Mint Limited and McGregor, Swire Air Services Limited, plaintiffs-appellants below (hereinafter referred to collectively as "Franklin Mint"), and Trans World Airlines, Inc. (TWA), defendant-appellee below, were the only parties to these proceedings. Neither International Air Transport Association (IATA) nor its member carriers (except TWA) were parties in the District Court or on the appeal. However, after the Panel of the Second Circuit's September 28, 1982 prospective unenforceability ruling, IATA and 36 of its member airlines filed an *amicus curiae* brief in support of TWA's petition for rehearing of the Panel's decision. IATA is an organization of 123 international air carriers, many of whom are either owned by ("government ownership" herein means greater than 50% government ownership) or represent foreign sovereign nations which are parties to the Warsaw Convention. Six U.S. airlines are members of IATA. See Appendix (hereinafter "App.") I (66a) for a list of IATA members. Those members who join in this petition are marked by an asterisk in App. I.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-1186

TRANS WORLD AIRLINES, INC.,
Petitioner,
v.

FRANKLIN MINT CORPORATION, FRANKLIN MINT
LIMITED and MCGREGOR, SWIRE AIR SERVICES LIMITED,
Respondents,

INTERNATIONAL AIR TRANSPORT ASSOCIATION AND
FORTY-THREE OF ITS MEMBER AIRLINES (SEE APPENDIX I),
Potential Intervenors.

PETITION FOR LEAVE TO INTERVENE IN
TRANS WORLD AIRLINES, INC. v.
FRANKLIN MINT CORP., NO. 82-1186 AND
PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
SECOND CIRCUIT OR, IN THE ALTERNATIVE,
BRIEF OF *AMICUS CURIAE* IN SUPPORT OF
PETITION FOR WRIT OF CERTIORARI OF
TRANS WORLD AIRLINES, INC.

Potential intervenors¹ pray for leave to intervene and further pray that a writ of certiorari be granted to re-

¹ Although not a "party" below within the meaning of 28 U.S.C. § 1254(1), petitioners IATA et al. will have that status if their petition to intervene is granted. Since the issues for review presented herein arose *after* briefing, argument and decision by the Court of Appeals, potential intervenors had no reason for prior participation. Because IATA and its members carry passengers and cargo

view the decision of September 28, 1982 of the United States Court of Appeals for the Second Circuit in *Franklin Mint Corp. v. Trans World Airlines, Inc.*

If this Court does not grant leave to intervene, potential intervenors pray that this petition be treated as an *amicus curiae* brief in support of TWA's petition for certiorari. The consent of Franklin Mint and TWA to such filing has been obtained.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 690 F.2d 303 and is set forth as App. A (1a) to this petition. The opinion and order of the District Court from which appeal was taken is reported at 525 F.Supp 1288 and is set forth as App. B (19a). The judgment of the Court of Appeals sought to be reviewed appears as App. C (24a).

JURISDICTION

The judgment of the Court of Appeals was entered on September 28, 1982. A petition for rehearing was denied on December 1, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).²

to the United States and are subject to litigation in our courts, they are vitally affected by the decision below, for the reasons explained further in Section C of the Statement of the Case. The purpose of IATA and its member airlines is (1) to promote safe, regular and economical air transportation for the benefit of the peoples of the world, foster air commerce, and study problems connected therewith; (2) to provide a means for collaboration among air transportation enterprises engaged in international air transport and services, and (3) to cooperate with the International Civil Aviation Organization (ICAO), an arm of the United Nations, and other international organizations. Thus, it is submitted that intervention is appropriate. See e.g., *Dames & Moore v. Regan*, 453 U.S. 654 (1981); *Banks v. Chicago Grain Trimmers Ass'n.*, 390 U.S. 459, *motion for leave to intervene granted*, 389 U.S. 813, *reh'g denied*, 391 U.S. 929 (1968); *Hunter v. Ohio ex rel. Miller*, 396 U.S. 879 (1969); *NLRB v. Acme Industrial Co.*, 384 U.S. 925 (1966).

² See note 1, *supra*.

CONSTITUTIONAL PROVISIONS AND TREATY INVOLVED

In this case the U.S. Court of Appeals for the Second Circuit expressly held the limitation of liability provisions of Article 22 of the Warsaw Convention³ for cargo damage, loss or delay prospectively unenforceable. Petitioners submit that the Court of Appeals' decision violates U.S. Const. art. II, § 2, cl.2, and art. VI, cl.2. For the text of the Warsaw Convention see App. D(26a); the applicable constitutional provisions are set forth in App. E(46a).

STATEMENT OF THE CASE

A. Summary of the Litigation And Decisions Below

In March, 1979 plaintiffs Franklin Mint contracted with TWA for carriage by air from the United States to England under an airway bill listing 714 pounds of numismatic materials.⁴ The articles were later stipulated to be worth more than the limitation on liability for loss or damage under Article 22 (2) and (4) of the Warsaw Convention.⁵ The materials were either

³ All references to "Warsaw Convention" or "Convention" are to the Convention for the Unification of Certain Rules Relating to International Transportation by Air, October 29, 1934, 49 Stat. 3000, T.S. 876, 137 L.N.T.S. 11 (A treaty adhered to by the United States October 29, 1934 and by over 100 foreign nations. The adhering nations are listed in App. D (26a)).

⁴ This constitutes "international transportation" within the meaning of Article 1 of the Warsaw Convention since the United States and the United Kingdom are parties to the Convention. See App. D(27a).

⁵ See App. D(36-37a). Article 22(2) of the Convention would limit liability to \$6,475.98 (250 francs per kilogram) in the absence of a special declaration of value. There was no such declaration in this case. The aforementioned franc is the so called "Poincare franc", which by conversion into U.S. dollars per pound at the last official U.S. price of gold (\$42.22 per troy ounce) amounts to a Warsaw limitation of liability of \$9.07 per pound (or approxi-

lost or destroyed, thus rendering TWA presumptively liable.⁶

Franklin Mint brought an action in the District Court to recover the full value of the lost goods, claimed to be \$250,000. TWA sought to limit its liability under Article 22(2) of the Convention and moved for summary judgment on "the sole issue [of] TWA's liability, exclusive of interest and costs".⁷

On that issue Franklin Mint urged that the free market price of gold was the applicable conversion standard. TWA suggested three other alternatives: (1) Special Drawing Rights (SDRs), the international unit of account established by the International Monetary Fund in 1968 (and substituted for the Poincare franc in the Montreal Protocols to the Warsaw Convention);⁸ (2) the last official price of gold in the United States (the conversion standard selected by the Civil Aeronautics Board (CAB));⁹ or (3) the exchange value of the current French franc. The District Court at 525 F.Supp. 1288 (19a) held that the applicable conversion standard for the limitation was the last official price of gold in the United States (21a), in reliance on CAB orders. Thus, the District Court entered judgment for Franklin Mint in the amount of \$6,475.98.

mately \$20 per kilogram). See CAB Order 74-1-16 (January 3, 1974) 39 Fed. Reg. 1526 (1974) (App. F(48a)) and CAB Order 78-8-10 (August 3, 1978) 43 Fed. Reg. 35971 (1978) (App. G (66a)).

⁶ See Article 18(1) (35a).

⁷ Stipulation and Pre-Motion Order dated June 30, 1981 (Court of Appeals Joint Appendix (A9a)). Thus, all parties and the Court contemplated that *some* limitation was applicable.

⁸ See pp. 8-9 and notes 22 and 27, *infra*, for explanation of the Montreal Protocols.

⁹ CAB Order 74-1-16 (January 3, 1974) (48a) establishes the last official price of gold as the unit of conversion under the Warsaw Convention at \$42.22 per troy ounce.

Franklin Mint appealed, and a Panel of the United States Court of Appeals for the Second Circuit, in an opinion of September 28, 1982 (1a) written by Judge Winter and joined by Judges Oakes and Cardamone, applied the last official U.S. price of gold as the conversion standard to the specific facts of the case but, without inviting briefing or argument on its prospective holding, held the Article 22(2) liability limitation of the Warsaw Convention, for loss of cargo, prospectively unenforceable "in United States courts". 690 F.2d at 304 (2a).¹⁰

The Court of Appeals rejected the last official price of gold as a unit of conversion on the ground that by repeal of the Par Value Modification Act in 1978¹¹ Congress had rejected gold as a monetary standard and that such repeal "was based on a domestic and international conclusion that the official price of gold was wholly out of

¹⁰ The decision is to "apply only to events creating liability occurring 60 days from the issuance of the mandate in this case." 690 F.2d at 311-12 (18a). The effect of the decision, as counsel for Franklin Mint and other plaintiffs' attorneys have suggested, may extend beyond cargo cases to all Warsaw Convention limits of liability, including those for passenger injury and death. See *Kelly v. B.V. Nederlandse Luchtvaart Maatschappij*, No. 82 Civ. 7830 (S.D.N.Y. filed November 24, 1982), a case filed since the decision below, wherein plaintiffs claim applicability of the Warsaw Convention, but also that the passenger limitation of liability is unenforceable. Furthermore, the Second Circuit itself has denied review of a similar question as to passenger cases, which suggests (perhaps inferentially) that the *Franklin Mint* limit of liability unenforceability holding may be dispositive in passenger cases as well. See *In Re Air Crash Disaster at Warsaw, Poland on March 14, 1980*, 535 F. Supp. 833 (E.D.N.Y. 1982), appeal denied on issue of appropriate unit of conversion, No. 82-8018 (2d Cir. Aug. 19, 1982).

¹¹ Par Value Modification Act, Pub. L. No. 92-268, 86 Stat. 116 (1972), amended by Par Value Modification Act, 31 U.S.C. § 449 (1973), repealed 1976 by Pub. L. No. 94-564, 90 Stat. 2660. The repealing Act was enacted in 1976 but became effective April 1, 1978.

touch with economic and monetary reality." 690 F.2d at 309 (13a).¹²

TWA petitioned for rehearing. IATA and the Air Transport Association of America (ATA)¹³ were permitted to file an *amicus curiae* brief in support of TWA's petition. The petition for rehearing was denied on December 1, 1982. TWA obtained a stay of issuance of the Second Circuit's mandate, pending its filing of a petition for writ of certiorari.

B. The Warsaw Convention, Its Protocols And Their Implementation By The U.S. Government

After the United Nations Charter, the Warsaw Convention is the most widely adopted of international treaties.¹⁴ It was signed by the parties in 1929 and continuously adhered to by the United States since 1934.¹⁵ Because it is self-executing it needed no supplementary Congressional legislation to bring it into force.¹⁶

The principal purpose of the framers of the Convention was to establish a uniform body of world-wide rules relating to carriage of passengers and cargo in international aviation transportation.¹⁷ The Treaty establishes a predictable, reliable and consistent basis for resolving

¹² This is discussed at length in TWA's Petition for Certiorari herein, pp. 5-6 and 15-17.

¹³ A non-profit association representing federally licensed U.S. air carriers providing scheduled air transportation both domestically and abroad. It is anticipated that ATA will seek to file an *amicus* brief herein.

¹⁴ A. Lowenfeld, *Aviation Law*, § 4.1, at 7-98 (2d ed. 1981).

¹⁵ See note 3, *supra*, and App. D (44a).

¹⁶ *Indem. Ins. Co. of North America v. Pan American Airways, Inc.*, 58 F. Supp. 338 (S.D.N.Y. 1944); *Garcia v. Pan American Airways, Inc.*, 269 A.D. 287, 55 N.Y.S. 2d 317, *aff'd*, 295 N.Y. 852, 67 N.E. 2d 257, *cert. denied*, 329 U.S. 741 (1946). See *Bacardi Corp. v. Domenech*, 311 U.S. 150, 161 (1940).

¹⁷ See TWA's Petition for Certiorari herein, pp. 4-5.

disputes as to liability or damage arising from such transportation, thereby providing some measure of stability in the international commercial aviation environment.¹⁸ The actual carrier is made presumptively liable for loss, damages or delay of the cargo (Article 18)¹⁹— and the *quid pro quo* for that is the limitation of its liability under Article 22 of the Convention.²⁰ The Convention also provides that all such claims arising under its provisions can only be brought subject to its provisions (Article 24) (37a). It also establishes notice of claim provisions (Article 26), and the jurisdictions where claims may be adjudicated (Article 28) (38-39a).

As another Panel of the Court of Appeals for the Second Circuit recognized just several years ago, the delegates to the Warsaw Convention knew that in years to come civil aviation would change in unforeseen ways. Yet “they wished to design a system of air law that would be both desirable and flexible enough to keep pace with these changes.” *Day v. Trans World Airlines, Inc.*, 528 F.2d 31, 38 (2d Cir. 1975), *cert. denied*, 429 U.S. 890 (1976), *reh'g denied*, 429 U.S. 1124 (1977). Therefore, while

¹⁸ See App. D(27-34a). To this end, the Warsaw Convention defines the international transportation to which it applies (Article 1), the ticket and baggage check requirements for passengers (Articles 3 and 4), the Air Waybill requirements (Articles 5, 6, 7 and 8), the contractual implications of the Cargo Air Waybill (Articles 9, 10 and 11), the rights of the consignor (shipper) and consignee (Articles 12, 13, 14 and 15) and certain customs requirements (Article 16).

¹⁹ And as to passengers and their baggage (Article 17) (35a).

²⁰ See *Reed v. Wiser*, 555 F.2d 1079, 1089 (2d Cir.), *cert. denied*, 434 U.S. 922 (1977); *Block v. Compagnie Nationale Air France*, 386 F.2d 323 (5th Cir. 1967), *cert. denied*, 392 U.S. 905 (1968); Lowenfeld and Mendelsohn, *The United States and the Warsaw Convention*, 80 Harv. L. Rev. 497, 499-500 (1967). See generally *Minutes, Second International Conference on Private Aeronautical Law, Warsaw, October 4-12, 1929* (Horner and Legrez trans. 1975). The presumptions of fault are contained in Articles 17-21 (35-36a) and Article 25 of the Convention (37-38a).

keeping the overall structure of the Convention intact (including the limit of liability provisions), the parties, including the United States, have, by means of the Guatemala City/Montreal Protocols, sought to amend the Convention.²¹

The Protocols substitute the SDR as a unit of conversion for Poincare francs in Article 22(4), provide for substantial upward revision of passenger liability limits, and permit each nation to supplement the Convention limits with a compensation plan.²² Montreal Protocols 3

²¹ Because of historical opposition in the United States to the Convention limits of liability for death and bodily injury (but not cargo), the U.S. has striven in recent years to persuade the Warsaw parties to revise upwards those limits. The Hague Protocol, Sept. 28, 1955, 478 U.N.T.S. 371, the result of a 1955 conference of the Warsaw parties, doubled the Warsaw limit of liability for bodily injury or death (cargo limitations were not an issue). It was signed but never ratified by the United States. See generally A. Lowenfeld, *Aviation Law*, pp. 7-100-127 (2d ed. 1981). On November 15, 1965 the United States gave formal notice of denunciation of the Convention because of the parties' unwillingness to agree to upward revisions of the bodily injury or death limit to amounts desirable to the United States (again, cargo limitations were not the rationale). 50 Dep't State Bull. 923 (1965). In the wake of the adoption of the Montreal Agreement, the U.S. withdrew its notice of denunciation on May 13, 1966. 54 Dep't State Bull. 955-57 (1966). The Montreal Agreement, raising the limitation of liability of the Warsaw Convention to \$75,000 for passenger injury or death, was filed with and approved by the CAB on May 13, 1966 as an interim measure pending amendment of the Warsaw Convention. CAB Agreement 18990. Cargo limitations of liability were not changed by the Montreal Agreement. See also note 31, *infra*.

²² The Guatemala City Protocol, reached in February-March, 1971, would establish a single unbreakable limit of liability of approximately \$100,000, liability without fault, and an increase of the baggage limitations to 62,500 francs per passenger. See generally A. Lowenfeld, *Aviation Law*, pp. 7-154-155 (2d ed. 1981). Again, there was no proposed change to the cargo limitations.

Montreal Protocols 3 and 4 were approved and signed by the Executive Branch and forwarded to the U.S. Senate for advice and consent January 14, 1977. They embody the Guatemala City Protocol

and 4 were signed by the United States in 1975 and are presently awaiting the advice and consent of the U.S. Senate.²³ As noted in the U.S. Senate Foreign Relations Committee Report on the Protocols, "[t]he Montreal Protocols are the result of decades of effort by the United States to improve the existing Warsaw Treaty system."²⁴ Thus, the United States government has made a clear commitment to adhere to the Convention, while working to amend some of its provisions, including those relating to limits of liability.²⁵

and when in force would change the unit of conversion in Warsaw Convention Article 22(4) from gold (Poincare francs) to Special Drawing Rights (SDRs). They would also raise the limits of liability for death to approximately 100,000 SDRs (approximately \$112,000) and provide for individual nations' establishment of a Supplemental Compensation Plan for passenger death. Their limit for loss or damage to cargo would be 17 SDRs (approximately \$20) per kilogram, regardless of fault. U.S. ratification would be subject to establishment of an adequate Supplemental Compensation Plan, as reviewed and approved by the CAB. S. Exec. Rep. No. 45, 97th Cong., 1st Sess., at 3-7 (1981). See note 31, *infra*.

²³ The Protocols were reported on favorably (16-1) by the U.S. Senate Foreign Relations Committee on November 17, 1981. S. Exec. Rep. No. 45, 97th Cong., 1st Sess., at 3-7 (1981). Although scheduled, they did not reach a floor vote in the last session of the 97th Congress and have been referred back to the Foreign Relations Committee. See *Aviation Week and Space Technology*, November 29, 1982, at 43-44; *Aviation Daily*, January 3, 1983, at 1.

²⁴ S. Exec. Rep. No. 45, 97th Cong., 1st Sess., at 5 (1981).

²⁵ Indeed, it appears that neither the Panel (nor the parties) had at their disposal the Detailed Report of the United States Delegation to the ICAO International Conference on Air Law, Sept. 1975, to revise Montreal Protocols 3 and 4 to the Warsaw Convention. That report demonstrates that it was the United States that urged the use of SDRs as the unit of conversion for the Montreal Protocols. Despite this clear expression of interest by the Executive Branch, the Court of Appeals suggests that because the United States Senate has not ratified these Protocols, their content is not a viable alternative, and that consequently there is no viable conversion rate. The Panel misapprehended the reason why the

Historically, and particularly since 1965, both the Executive and Legislative Branches have relied upon the Civil Aeronautics Board (CAB) to deal with Convention issues involving limitations of liability. Congress has delegated to the CAB authority to coordinate and review international airline matters and agreements²⁶ and the power and duty to investigate and ensure that the tariffs governing foreign air transportation, including the limitation of liability for cargo carriage, are lawful, fair and reasonable; and to suspend any tariff found to be unlawful;²⁷ consistent, however, with any treaty obligation of the United States.²⁸ Since the Warsaw Convention is self-executing, the method of converting the Poincare franc into "lawful money of the United States"²⁹ pursuant to Article 22(4) of the Convention (37a) has clearly become a tariff function and within the Board's legislative rulemaking functions under the Federal Aviation Act.³⁰

Despite changes in the use of gold as a currency base and the ongoing Warsaw Convention amendment process, the latest CAB staff memorandum as to the appropriate unit of conversion affirms the selection of the last official price of U.S. gold by CAB Order 74-1-16 (48a):

[T]he Board's current course of action [use of the last official U.S. price of gold as a unit of conversion] is superior to any of the alternatives currently available Pending resolution of this issue by the three agencies [CAB, Department of Transportation, Department of State] we believe the Board

Guatemala/Montreal Protocols have not been adopted by the United States. The controversy that has delayed legislative approval has to do only with the total supplemental compensation package, not the selection of the SDR as the international unit of conversion.

²⁶ 49 U.S.C. §§ 1382 and 1386.

²⁷ 49 U.S.C. §§ 1374(a) and 1482.

²⁸ 49 U.S.C. § 1502.

²⁹ 49 U.S.C. § 1373(a).

³⁰ 49 U.S.C. § 1301 *et seq.*

should take no action which would disturb the conversion formula now contained in sections 221.175 and 221.176 of the [CAB] regulations [14 C.F.R. §§ 221.175 and 221.176 (1981)].

Memorandum prepared by John Golden, Director, Bureau of Compliance and Consumer Protection, Civil Aeronautics Board, May 20, 1981 (App. H (58a)). Over the years, the Board has also been responsible for implementing other provisions of the Convention and its Protocols³¹—particularly in recent years while coordination of the Montreal Protocols was in process.

C. The Interest of IATA And Its Member Airlines

We recognize that a request to intervene before this Court is unusual. The unanticipated³² decision of the

³¹ For instance, in 1966 the Executive Branch deferred to the Board for review and approval of the compromise Montreal Agreement, CAB No. 18990, as an interim measure pending negotiation and ratification of a new treaty. Also, CAB Order 74-1-16 (48a) converted Poincare francs into U.S. dollars at the last official U.S. price of gold. And at the Senate hearings regarding the Montreal Protocols, the Senate Foreign Relations Committee received the views of the Board regarding the status of the Supplemental Compensation Plan (prepared pursuant to the Montreal Protocols), which is still pending before the Board. See *Civil Aviation Protocols: Hearing Before the Committee on Foreign Relations United States Senate*, 97th Cong., 1st Sess., at 6-8 (1981). Indeed, the Senate is looking to the Board for a reevaluation of the proposed Supplemental Compensation Plan (See CAB Order 77-7-85 (July 20, 1977)) as a condition subsequent to ratification; i.e., it would come into force *only* if the CAB makes a favorable determination. See S. Exec. Rep. No. 45, 97th Cong., 1st Sess. (1981). The Plan would be subject to review in United States courts, presumably by petitioners herein. See 5 U.S.C. § 702; *Chrysler Corp. v. Broun*, 441 U.S. 281, 317 (1979).

³² The result reached by the Court of Appeals had not previously been briefed by the parties, nor did IATA and its member airlines anticipate such a decision. Since the only issue in the case prior to the Panel's decision was the conversion standard for the limitation (stipulated and so ordered by the District Court), and since that

Court of Appeals has the practical effect of denying the member airlines (and at least vicariously some of their owner governments) participation in the normal Warsaw Convention administrative procedures employed by the United States during the amendment process. It also results in additional exposure to unlimited damages and attendant additional costs in the thousands of cargo suits filed each year. Therefore, we submit that intervention is appropriate.³³

Most of IATA's 123 international members carry air cargo to and from the United States and are consequently subject to litigation in American courts.³⁴ They carry on their day-to-day business in reliance on the Warsaw Convention framework. The disruption of this structure by judicial abrogation of the limitation will greatly hamper this important international commerce, and significantly increase the cost of doing business in an indus-

issue had been litigated before other courts with various results, see note 51, *infra*, IATA did not seek to burden the judicial process by prior intervention.

³³ See note 1, *supra*. IATA has standing to bring this constitutional challenge in its own right and on behalf of its members. *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 458-59 (1958); *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 183-87 (Burton, J., concurring) (1951); *United States v. SCRAP*, 412 U.S. 669 (1973); *Sierra Club v. Morton*, 405 U.S. 727 (1972). IATA and its members meet the test of standing enunciated in *Baker v. Carr*, 369 U.S. 186, 204 (1962). Cf. *Duke Power Co. v. Carolina Environmental Study Group*, 438 U.S. 59, 80-81 (1978):

Where a party champions his own rights, and where the injury alleged is a concrete and particularized one which will be prevented or redressed by the relief requested, the basic practical and prudential concerns underlying the standing doctrine are generally satisfied when the constitutional requisites are met. See, e.g., *Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977).

³⁴ If the airway bill is issued here or the destination is the United States, they are subject to suit here even if they are an interline carrier. See Article 30(2) (39a).

try already staggering under the economic burdens of the times and the effects of deregulation. Indeed, the disarray sown by this case may not be confined to Warsaw cargo cases (for the treaty provisions are interrelated), nor to the aviation industry alone.³⁵ The member airlines of IATA (and in some cases, their governments) have a right to know whether, by virtue of this decision, the United States, consistent with the actions of the Legislative and Executive Branches, remains a supporter of the Warsaw Convention framework.

IATA's members and their governments fully support the principle of liability limitation embodied in the Warsaw Convention and subsequent treaties. IATA, its member airlines, their respective governments, and shippers in international air transportation rely upon the good faith of the United States in the treaty-making process and United States court decisions in making their business and legal decisions.³⁶

The Warsaw Convention greatly facilitates an international commercial process and uniformly establishes vari-

³⁵ See, e.g., Brussels Convention, August 25, 1924 (The Hague Rules), 51 Stat. 233 (limit of liability unit of conversion in Poincaré francs for loss of international maritime cargo); United Nations Convention on the Carriage of Goods By Sea, 1978 (The Hamburg Rules), A/CONF. 89/13, 30 March 1978 (limit of liability unit of conversion in SDRs for loss of international maritime cargo (to supercede The Brussels Convention)). The SDR is a unit of account in no less than 15 international conventions (some of which are in effect). Merren, *The SDR as a Unit of Account in Private Transactions*, 16 Int'l Law 503, 505 (1982).

³⁶ See note 51, *infra*. It is anticipated that some of their governments may file official communications with the United States Department of State protesting or objecting to the decision, and urging the United States Executive Branch to take appropriate steps to support its commitment to a uniform treaty structure. For these and other reasons suggested, *infra*, this Court should invite the views of the Solicitor General as to the Court of Appeals' decision. See *California v. Texas*, 450 U.S. 961 (1981); *Crist v. Cline*, 434 U.S. 980 (1977).

ous predictable commercial criteria relevant to the day-to-day conduct of business in international air cargo shipment. The judicial disruption of this structure by abrogation (or reservation) of the limitation of liability provisions will only proliferate uncertainty, increase litigation and complicate business dealings.³⁷

Even more important for purposes of the constitutional question herein, IATA is sensitive to the international repercussions of the Court of Appeals' decision among the world's governments and seeks herein to advise this Court of those problems. In the interest of judicial economy, the question presented herein should be promptly and finally resolved³⁸ before the Court of Appeals' decision engenders a plethora of lawsuits brought under the "no limit of liability" regime. If courts permit the unenforceability holding to be asserted in passenger cases, the upheaval and foreign government reaction could be exponentially greater. See, e.g., *Duke Power Co. v. Carolina Environmental Study Group*, 438 U.S. 59, 83 (1978).³⁹

REASONS FOR GRANTING THE WRIT

A. The Decision Of The Court Of Appeals Violates The Constitutional Separation Of Powers Doctrine By Improperly Interjecting The Judiciary Into The Conduct of Foreign Relations

1. *The Judiciary Has Intervened in the Treaty Negotiation Process*

The Constitution reserves to the Executive Branch the power to negotiate and make treaties, with the advice and consent of the Senate.⁴⁰ The primacy of the political

³⁷ See also pp. 6-7, *supra*.

³⁸ However, we do not believe this Court needs to decide the proper conversion factor in Article 22 of the Convention to rectify the disarray caused by the Court of Appeals' decision.

³⁹ See also pp. 22-25, *infra*.

⁴⁰ U.S. Const. art. II, § 2, cl. 2 (46a).

branches in the conduct of the Nation's foreign relations has always been a cornerstone of the federal judiciary's self-restraint. While the Judicial Branch's power extends to interpretation of treaties,⁴¹ treaties are to be interpreted liberally to carry out the intent of the drafters. *Nielson v. Johnson*, 279 U.S. 47, 51 (1929). If circumstances have changed, the court is to examine the conduct of the parties subsequent to ratification of the treaty in order to ascertain its proper construction. See *Pigeon River Improv. Slide & Boom Co. v. Charles W. Cox, Ltd.*, 291 U.S. 138, 153-63 (1934); *Kolovrat v. Oregon*, 366 U.S. 187, 192-194 (1961). The judiciary may not generate a reservation or declare an abrogation of a treaty unless it finds the treaty unconstitutional⁴² or holds that it has been superceded by subsequently enacted and conflicting legislation.⁴³ However, to hold a treaty superceded by subsequent legislation in conflict with it, a court must find that Congress' intent to supercede was clear, definite and specifically in contemplation of the treaty superceded. See *Cook v. United States*, 288 U.S. 102, 120 (1933); *United States v. Lee Yen Tai*, 185 U.S. 213, 22 S. Ct. 629, 632 (1902); *Union Pacific Railroad v. United States*, 99 U.S. 700, 718 (1879); *Valentine v. United States*, 299 U.S. 5, 10-11 (1936); cf. *Whitney v. Robertson*, *supra*. Furthermore, it has never seriously been suggested that the judiciary has the power to terminate or generate judicial reservations to treaties.⁴⁴ The judi-

⁴¹ U.S. Const. art. III, § 2, cl. 1 (46a).

⁴² The treaty power is unlimited except as it "extends so far as to authorize what the Constitution forbids . . ." *Geofroy v. Riggs*, 133 U.S. 258, 267 (1890). See *Reid v. Covert*, 354 U.S. 1, 16-17 (1957); *Terlinden v. Ames*, 184 U.S. 270 (1902); *Doe ex dem. Clark v. Braden*, 16 How. 635, 657 (1853). There was no suggestion by the Court of Appeals in *Franklin Mint* of any constitutional infirmity in the Warsaw Convention.

⁴³ *Whitney v. Robertson*, 124 U.S. 190, 194 (1889).

⁴⁴ Cf. *Goldwater v. Carter*, 481 F.Supp. 949 (D.D.C.), *rev'd*, 617 F.2d 697 (D.C. Cir.), *vacated*, 444 U.S. 996 (1979).

ciary's "role is limited to giving effect to the intent of the Treaty parties." *Sumitomo Shoji America, Inc. v. Avagliano*, 102 S.Ct. 2374, 2380 (1982).

While professing its adherence to these basic principles, the Court of Appeals did precisely what it said it could not do.⁴⁵ It created, in effect, a judicial reservation in an existing treaty. More importantly, it also interjected itself into the delicate process of renegotiation of the Warsaw Convention framework, a matter which the Constitution quite clearly leaves in the hands of the political branches.

As we have noted above, the framers of the Warsaw Convention understood that, in years to come, civil aviation would change in unforeseen ways.⁴⁶ They accepted the inevitability of future modification of the agreement but committed themselves to make those adjustments within the Convention's basic framework. Indeed, the United States, dissatisfied with the low limits of liability set forth in the Treaty, at one point contemplated denunciation but decided to work within the framework of the Convention for a general modernization of the limits of liability.⁴⁷ It took a leadership role in the delicate reconciliation of competing interests within the international community. Those efforts culminated in the Guatemala City/Montreal Protocols. Today, ratification of the Montreal Protocols await the advice and consent of the Senate. In the interim, the political branches of the United States government, along with the governments of the other parties, have committed themselves to operate within the framework of the Convention.

⁴⁵ It claimed to recognize that "it is not the province of courts to declare treaties abrogated. . . ." 690 F.2d at 311, n.26 (17a).

⁴⁶ See p. 7, *supra*. *Day v. Trans World Airlines, Inc.*, 528 F.2d at 38.

⁴⁷ See pp. 8-9, *supra* and notes 21 and 22, *supra*.

By declaring that the limitation on liability provision of the Convention is unenforceable in "United States courts",⁴⁸ the Court of Appeals unilaterally took, in effect, precisely the action which the political branches declined to take when, rather than denounce the Treaty,⁴⁹ they determined to work with other nations for its modernization.⁵⁰ Taking this unilateral action, the Panel of the Second Circuit, unlike every other federal court⁵¹ and foreign court⁵² to consider the matter, ignored the obvious

⁴⁸ 690 F.2d at 304 (6a).

⁴⁹ Between signing and ratification of a treaty (as in the case of Montreal Protocols 3 and 4), a party is obliged not to take any action in contravention of the treaty. *United States v. D'Auvere*, 51 U.S. 609 (10 How. 607, 623) (1850). The same principle applies under Article 18 of the Vienna Convention on the Law of Treaties, reprinted in 81 I.L.M. 679, 686 (1969), which, although not ratified by the United States, has been relied upon by U.S. courts. See, e.g., *Greater Tampa Chamber of Commerce v. Goldschmidt*, 627 F.2d 258, 263 n.4 (D.C. Cir. 1980); *Hussler v. Swiss Air Transport Co.*, 351 F.Supp. 702, 707 (S.D.N.Y. 1972), *aff'd per curiam*, 485 F.2d 1240 (2d Cir. 1973).

⁵⁰ See notes 21, 22 and 23, *supra*.

⁵¹ See *In Re Air Crash Disaster at Warsaw, Poland on March 14, 1980*, 535 F. Supp. 833 (E.D.N.Y. 1982) (selecting last official U.S. price of gold in Warsaw passenger case), *appeal denied on that issue*, No. 82-8018 (2d Cir. Aug. 19, 1982). *Boehringer Mannheim Diagnostics, Inc. v. Pan American World Airways, Inc.*, 531 F. Supp. 344 (S.D. Tex. 1981) (selecting free market price of gold in Warsaw cargo case), *appeal pending*, No. 81-2519; *Deere & Co. v. Deutsche Lufthansa A.G.*, N.D. Ill. No. 81 C 4726 (Dec. 30, 1982) (selecting last official U.S. price of gold in Warsaw cargo case).

⁵² The following foreign cases demonstrate a willingness by foreign courts to select a Warsaw unit of conversion in the face of shifting currency bases (references in parentheses are to the Court of Appeals Joint Appendix): *Pakistan International Airlines v. Compagnie Air Inter S.A.*, No. 79/2278, Court of Appeals of Aix-en-Provence, France (October 30, 1980) (A156-A170); *Hornlinie A.G. v. Societe Nationale Petroles Aquitaine*, Supreme Court of the Netherlands, 7 Eur. Trans. L. 933 (1972) (A126-A155); *Companhia de Seguros Maritimos v. Varig*, Federal Court of Appeals of Brazil (June 3, 1975); *Association Aeronautique v. Thierache*, Tribunal

intent of the United States and its Treaty partners to maintain the Treaty framework despite the transitory difficulties thus far in setting the conversion standard.

2. *The Court of Appeals Has Disregarded the Division of Labor Within the Political Branches*

Another factor makes even more obvious the radical nature of the Court of Appeals' departure from the accepted paths of judicial behavior with respect to the administration of treaty relations. In holding the limitation of liability provision of the Convention unenforceable because of the proposed impossibility of devising a satisfactory conversion formula, the Panel did further violence to the separation of powers principle by failing to acknowledge the unique role which the CAB plays in this aspect of effectuating the Warsaw Convention in the United States. Through the delicate process of renegotiating the Convention, the Executive Branch has relied on the CAB to confirm a viable conversion standard. Far from following the "law of inertia" as suggested by the Court of Appeals,⁵³ the Board, after vigorous internal debate,⁵⁴ acted consistently with the intent of the treaty

de Grande Instance, Paris, France (February 10, 1973); *Kuwait Airways Corp. v. Sanghi*, Bangalore, India (August 11, 1978) (A265-A271); *Balkan Bulgarian Airlines v. Tamaro*, Court of Milan, Italy (October 25, 1976) (A262-A264); *Fida Cinematografica v. Pan American World Airways*, Rome Civil Court, Italy (October 13, 1976); *Linee Aeree Italiane v. Riccioli*, No. 609/79, Rome Civil Court, Italy (November 14, 1978) (A95-A107); *Florenzia Cia Argentina de Seguros S.A. v. Varig S.A.*, Buenos Aires, Argentina, 1977 Uniform L. Rev. 198 (August 27, 1976) (A255-A261); *Zakapoulos v. Olympic Airways Corp.*, No. 256/74, Court of Appeal, 3d Dep't Athens, Greece (February 15, 1974) (A251-A254). The United Kingdom, by Statutory Instrument 1980 No. 281, has selected SDRs as the Warsaw Convention conversion standard (A62-A63). Canada, by regulation, has also established SDRs as the Warsaw conversion standard. Carriage By Air Act Regulations, P.C. 1983—Jan. 13, 1983 (effective date Jan. 14, 1983).

⁵³ 690 F.2d at 310 (14a).

⁵⁴ Court of Appeals Joint Appendix A32-A46, A52-A56.

and has applied the official price of gold during the interim period.⁵⁵ Thus, the CAB, like the Executive Branch, has chosen to maintain the status quo⁵⁶ and the effectiveness of a treaty that is adhered to not only by the United States, but also by over 100 other sovereign nations.

The Court of Appeals has disregarded the presumptive validity of the CAB orders⁵⁷ and, consequently, the historical role which this agency has played in the administration of the United States' obligation under the Warsaw Convention.⁵⁸ Reviewed in light of the CAB's role, the Court of Appeals' holding that repeal of the Par Value Modification Act of 1973⁵⁹ constituted "an explicit abandonment of the previously established unit of conversion"⁶⁰ in the Warsaw Convention is especially superficial.⁶¹ Of course, even under the basic principles of treaty

⁵⁵ See note 5, *supra*, and CAB Orders 72-6-7 (June 2, 1972) 37 Fed. Reg. 11384 (1972); 74-1-16 (Jan. 3, 1974) (48a); 78-8-10 (Aug. 3, 1978) (52a).

⁵⁶ See Golden Memorandum, pp. 10-11, *supra* (58a); CAB Order 74-1-16 (48a); and 14 C.F.R. §§ 221.175 and 176 (1981).

⁵⁷ Contrary to the Court of Appeals' assumption that the CAB's last statement converting the gold French franc to dollars predates the repeal of the Par Value Modification Act of 1973, the Board on August 3, 1978, stated, with respect to IATA Conditions of Cargo Carriage, "At the present time a carrier's liability for Warsaw traffic . . . is \$20 per kilogram. . . ." CAB Order 78-8-10 (August 3, 1978) (52a).

⁵⁸ The decision also interferes with the joint effort of the Executive Branch and the CAB to develop a Supplemental Compensation Plan pursuant to the Montreal Protocols. See notes 22 and 31, *supra*.

⁵⁹ Par Value Modification Act, Pub. L. No. 92-268, 86 Stat. 116 (1972), amended by Par Value Modification Act, 31 U.S.C. § 449 (1973), repealed 1976 by Pub. L. No. 94-564, 90 Stat. 2660.

⁶⁰ 690 F.2d at 311 (17a).

⁶¹ In fact, neither the legislative histories of the Par Value Modification Acts nor the statute repealing the latter make any mention of the Warsaw Convention. The legislative history of the repealing

interpretation outlined above, the potential result would be highly questionable since "the intention to abrogate or modify a treaty is not to be lightly imputed to Congress." *Pigeon River Improv. Slide & Boom Co. v. Charles W. Cox, Ltd.*, 291 U.S. at 160, *quoted in Menominee Tribe of Indians v. United States*, 391 U.S. 404, 413 (1968). Certainly, a statute which, by the Court of Appeals' own admission was not aimed at abrogating the Warsaw Convention,⁶² but rather ameliorating monetary shifts, cannot be said to amount to a congressional denunciation of the Treaty here.

However, it is not necessary to rely simply on the general principles of treaty interpretation. The CAB, the agency relied upon by the Executive and charged by the Legislative Branch⁶³ with the responsibility for administration of this aspect of U.S. treaty obligations under the Warsaw Convention, has—despite the repeal of the Par Value Modification Act—consistently held to the regulations established by CAB Order 74-1-16 (48a), which applies the last official price of gold as the appropriate conversion standard for cargo (and other Warsaw) limits of liability.⁶⁴ Indeed, more than two years after the

Act reflects the Senate's recognition that there were other purposes for which the official price would still be used to determine the monetary value of gold. It was noted that the "only domestic purpose for which it is necessary" was to determine the value of gold held in the form of gold certificates. See 690 F.2d at 308, n.11 (10a). The clear inference was that there were other international purposes, but this was overlooked by the Court of Appeals. 690 F.2d at 309, n.20, referring to n.12 [*sic*; it should be n.11] (13a). Clearly, the issue in this case is international, not domestic.

⁶² "Congress may not have focused explicitly upon the Convention in repealing [the Par Value Modification Act]. . . ." 690 F.2d at 311 (17a).

⁶³ See notes 28 and 30, *supra*.

⁶⁴ See notes 5 and 9, *supra*. See also 14 C.F.R. §§ 221.175 and 176 (1981). Moreover, the Court of Appeals apparently mistakenly believed that application of the official rate of gold to Warsaw

Jamaica Accords and the legislation repealing the Par Value Modification Act of 1973, and more than four months after that legislation became effective on April 1, 1978, the CAB valued the cargo limit according to the last official price of U.S. gold.⁶⁵ Accordingly, there was no basis on which the Court of Appeals could constitutionally render unenforceable the liability limits of Article 22 of the Convention. Even were the Court of Appeals' decision devoid of constitutional infirmity, it would merit this Court's review because it conflicts with the "familiar rule that the obligations of treaties should be liberally construed so as to give effect to the apparent intention of the parties." *Valentine v. United States*, 299 U.S. at 10.⁶⁶

Convention limitations was derived solely from the Par Value Modification Act of 1973 and its predecessor. When the Par Value Modification Act adjusted the official rate of gold, the CAB directed the carriers to apply the new rate of conversion in their tariffs. The power to mandate use of the official price was derived from the Federal Aviation Act (*see* CAB Order 72-6-7, June 2, 1972) and not from the Par Value Modification Act. In issuing that Order, the CAB took into consideration a number of policy factors, of which the Par Value Modification Act was only one, including the continuing application of the Warsaw Convention. Accordingly, legislation repealing the Par Value Modification Act should not be taken to have precluded the CAB's approval of the last official price of gold for filing in air carrier tariffs governed by the Warsaw Convention.

⁶⁵ See note 57, *supra*.

⁶⁶ Prior to *Franklin Mint*, the Second Circuit had followed this rule. *See Benjamins v. British European Airways*, 572 F.2d 913, 918 (2d Cir. 1978), *cert. denied*, 439 U.S. 1114 (1979); *Reed v. Wiser*, 555 F.2d 1079 (2d Cir.), *cert. denied*, 434 U.S. 922 (1977); *Day v. Trans World Airlines, Inc.*, 528 F.2d 31, 35 (2d Cir. 1975), *cert. denied*, 429 U.S. 890 (1976), *reh'g denied*, 429 U.S. 1124 (1977).

B. The Decision Of The Court Of Appeals Has And Will Seriously Disrupt International Air Commerce And The Federal Courts

1. *The Decision Has an Immediate Adverse Effect on the International Air Cargo System*

The Court of Appeals' prospective unenforceability holding frustrates the purposes of the Convention not only by casting into limbo air cargo shippers and carriers who will be in litigation over loss or damage to cargo but also by disrupting the routine conduct of the international air cargo business.⁶⁷ Quite simply, if the Court of Appeals' mandate takes effect, there will be no limit on liability in suits filed in at least Second Circuit courts, if not all "United States courts",⁶⁸ for loss or damage as to Convention-governed air cargo shipments where there has been no special declaration of value under Article 22 (36a). Since a special declaration under Article 22 for *each* item of cargo is simply not practical in most cases for reasons of time, practice and course of dealing, the shippers and air carriers (and their governments) must separately or together consider new arrangements. Obviously, if the Court of Appeals' decision stands, some new arrangements for *some* shippers and *some* carriers must be attempted, but they will probably differ and some may prove impractical. This new process would certainly undermine the uniformity, stability, predictability and reliability envisioned by the framers of the Warsaw Convention.

⁶⁷ As noted at pp. 6-7, *supra*, the Warsaw Convention establishes uniform documentation and commercial obligations requirements, providing an internationally consistent scheme for both cargo shippers and air carriers. In the absence of these provisions both shippers and carriers would have to resort to local rules of commerce as varied as the number of Warsaw contracting parties. The Convention aids in avoiding such a morass and also aids and enables shipping cargo anywhere in the world on a single air waybill.

⁶⁸ 690 F.2d at 304 (6a).

The Court of Appeals apparently recognized the devastating effect that this holding might have on the present international aviation system when it provided a moratorium on the effect of the unenforceability ruling and suggested that the airlines reformulate their tariffs filed with the CAB.⁶⁹ The Panel's suggestion is unrealistic. International tariffs must be reciprocally consistent. Their reformulation would involve innumerable intricacies and unavoidable delays. In some countries, new enabling legislation and new operating agreements may have to precede amendment of conditions of contract and airway bills by foreign air carriers. Tariff reformulation in this country would also be subject to a time-consuming process, which would necessarily require more than the 60 days allowed by the Panel.⁷⁰ Thus, during the interim, the current system would be destabilized, and its uniformity would suffer severely.

2. The Decision Has An Immediate Adverse Effect on the Federal Courts

Apparently, the Court of Appeals suggested that tariffs might establish a new limit of liability. Even if new tariffs and new procedures are ultimately upheld, the legal system will be more burdened by a plethora of litigation (including future resort to this Court when, inevitably, the decisions are inconsistent). Such legal challenges would not be limited to those mentioned above, but may include additional issues, relating, *inter alia*, to the continued viability of the presumption of liability under

⁶⁹ 690 F.2d at 312 (18a).

⁷⁰ The CAB has recently promulgated a new rule covering tariffs for interstate or overseas air transportation as defined in the Federal Aviation Act, 49 U.S.C. § 1301, *et seq.* The primary reason for the new rule is the elimination of domestic tariffs as of January 1, 1983 pursuant to the Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705 (1978). See 47 Fed. Reg. 14,892 (1982) (to be codified at 14 C.F.R. § 399). Similar implementation orders would probably be necessary for international tariffs if the Panel's decision remains undisturbed, which could cause further delay.

Article 18 of the Warsaw Convention, the required content of new notice provisions, and the effect of possibly inconsistent findings by foreign courts on similar issues.⁷¹ As previously noted, Franklin Mint's attorney has already suggested that *any* tariff attempting to limit liability might be subject to legal challenge.⁷² Other cargo shippers' attorneys have already raised issues similar to those presented herein in other courts⁷³ with differing results, and certainly numerous additional legal challenges may be anticipated.

Although we deal herein with limitations on cargo claims rather than those connected with personal injury or death of passengers, the number of such commercial matters litigated in United States courts is several times the number of passenger cases. To date, because of the uniformity and predictability of the limitation provisions, most of these cargo claims are settled—but the effect of the decision below will make settlement more difficult and increase the number of cases filed and ultimately tried.⁷⁴ These practical, severe consequences to the exist-

⁷¹ For example, courts of other contracting parties to the Convention may reassess their interpretation of the need for uniformity as to limits of liability, further exacerbating the disarray among air carriers, their shippers and insurers. Moreover, under Articles 19 and 60 of the Vienna Convention on the Law of Treaties, *supra*, note 49, the parties to the Warsaw Convention might contend that the Court of Appeals' decision constitutes a material breach of the Convention entitling them to terminate the Convention. *See also* Restatement, 2d Foreign Relations Law of the United States, § 153.

⁷² Remarks of John Foster, Esq., Luncheon of the Air Transportation Law Committee and the Water Transportation Law Committee of the Federal Bar Association, December 7, 1982, Washington, D.C. *See also* note 10, *supra*.

⁷³ *See* note 10, *supra*.

⁷⁴ With a presumption of liability and the *quid pro quo* of limitation thereon, the issues and proof of a claim are limited—if the Convention were not in existence, proof of delivery, events, defenses, etc. would complicate the issues and the facts in every case.

ing international air cargo regime demonstrate why, when nations have agreed upon a treaty, it should not lightly be disregarded.

3. *The Decision Has An Adverse Long-Term Effect on International Air Commerce*

If the Court of Appeals' decision is allowed to stand, how will United States initiatives and commitments be regarded at future meetings of Warsaw Convention parties or, indeed, at similar international meetings?

The United States is regarded as an important party to the Warsaw Convention because of the relative size of its aviation industry and its relatively large share of international air traffic. Nevertheless, in a world increasingly conscious of sovereign independence, the United States cannot act unilaterally in a treaty context. Of course, the United States may at times seek to change its treaty relationships or withdraw from treaties or seek to change treaty terms. But such steps should be taken advisedly by the Executive Branch—not by the judiciary. Courts “should hesitate long before limiting or embarrassing” the sovereign powers of the United States, particularly as they concern foreign affairs. *Mackenzie v. Hare*, 239 U.S. 299, 311 (1915), *quoted in United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 322 (1936).

Foreign relations is certainly one area where the United States should speak with “one voice”. If allowed to stand, the Court of Appeals' decision will surely vitiate the longstanding commitment of the Roosevelt Administration that the United States would give full, “good faith” observance to the Warsaw Convention.⁷⁵ The contracting parties have manifested an intent to keep the

⁷⁵ Proclamation of President Franklin D. Roosevelt declaring U.S. adherence to the Warsaw Convention, 49 Stat. 3000, T.S. 876 (1934).

Warsaw Convention, including the limitation of liability concept, alive despite the ambiguities caused by the changing world monetary situation.⁷⁶ The United States, through its Executive Branch, has also sought to further those goals. This Court should not permit the judiciary, on its own motion, to isolate the U.S. legal system or place in further doubt whether this nation "speaks with one voice" with respect to foreign affairs. See *Michelin Tire Corp. v. Wages*, 423 U.S. 276, 285 (1976); *Department of Revenue of Washington v. Association of Washington Stevedoring Cos.*, 435 U.S. 734, 752-53 (1978); *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 449 (1979). As this Court noted in *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 9 (1972), the day is long past when our courts can adhere to the "parochial concept" that "trade and commerce in world markets and international waters [be] exclusively on our own terms, governed by our laws, and resolved in our courts." See also *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 516 (1974); *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981). The abolition of all standards of liability is simply not a situation desired by any nation, including the United States. Thus, it must be recognized that the decision of the Court of Appeals will have a significant adverse impact on the United States' ability to deal effectively with international legal transactions in other contexts.

⁷⁶ See note 52, *supra*.

CONCLUSION

For the reasons stated above, leave should be granted for petitioners to intervene and to file a petition for writ of certiorari to review the opinion and judgment of the United States Court of Appeals for the Second Circuit in *Franklin Mint*. Alternatively, if leave to intervene is denied, petitioners request that this Court treat the petition as an *amicus curiae* brief in support of TWA's petition for certiorari.⁷⁶

Respectfully submitted,

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⁷⁷ The page limitation for *amicus* briefs in support of petitions for certiorari is 20 pages, Sup. Ct. R. 36.1, but that rule does not require *amicus* briefs to contain a Statement of the Case. Were the Statement of the Case and those appendices which would normally accompany only a petition for certiorari omitted, this document would meet the 20-page requirement for *amicus* briefs.

NOTION FILED
JAN 20 1983

No. 82-1186

IN THE
Supreme Court of the United States

OCTOBER TERM, 1982

TRANS WORLD AIRLINES, INC.,
Petitioner,
v.

FRANKLIN MINT CORPORATION, FRANKLIN MINT
LIMITED and MCGREGOR, SWIRE AIR SERVICES LIMITED,
Respondents,

INTERNATIONAL AIR TRANSPORT ASSOCIATION AND
FORTY-THREE OF ITS MEMBER AIRLINES (SEE APPENDIX I),
Potential Interveners.

APPENDIX TO
PETITION FOR LEAVE TO INTERVENE IN
TRANS WORLD AIRLINES, INC. v.
FRANKLIN MINT CORP., NO. 82-1186 AND
PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
SECOND CIRCUIT OR, IN THE ALTERNATIVE,
BRIEF OF *AMICUS CURIAE* IN SUPPORT OF
PETITION FOR WRIT OF CERTIORARI OF
TRANS WORLD AIRLINES, INC.

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 999—August Term, 1981

(Argued April 22, 1982 Decided September 28, 1982)

Docket No. 82-7012

FRANKLIN MINT CORPORATION, FRANKLIN MINT LIMITED,
and MCGREGOR, SWIRE AIR SERVICES LIMITED,
Plaintiffs-Appellants,
v.

TRANS WORLD AIRLINES, INC.,
Defendant-Appellee.

Before:

OAKES, CARDAMONE, and WINTER,
Circuit Judges.

Appeal from a final judgment of the United States District Court for the Southern District of New York, Whitman Knapp, *Judge*, utilizing the last official price of gold to calculate the limit on defendant's liability under the Warsaw Convention.

The Court holds the limitation provision of the Convention prospectively unenforceable and affirms.

JOHN R. FOSTER, New York, New York (Donald M. Waesche, Waesche, Scheinbaum & O'Regan, P.C., New York, New York, of counsel), *for Plaintiffs-Appellants Franklin Mint Corporation, Franklin Mint Limited, and McGregor, Swire Air Services, Limited.*

JOHN N. ROMANS, New York, New York (Robert S. Lipton, Scott J. McKay Wolas, Curtis, Mallet-Prevost, Colt & Mosley, New York, New York, of counsel) *for Defendant-Appellee Trans World Airlines, Inc.*

(Robert B. Hemley, Norman Williams, Gravel, Shea & Wright, Burlington, Vermont, of counsel) *for Amici-Curiae Jacques Roulin and Hugh Harley.*

WINTER, *Circuit Judge:*

This is an appeal from a final judgment of the United States District Court for the Southern District of New York, Whitman Knapp, *Judge*, limiting the defendant's liability under the Warsaw Convention ("Convention")¹ for loss of cargo. In determining the limit in United States dollars, Judge Knapp utilized the last official price of gold as a unit of conversion and awarded plaintiffs \$6,475.98. 525 F.Supp. 1288 (S.D.N.Y. 1981). Plaintiffs appeal, claiming the limit should have been calculated by other methods. While we agree with the result reached in this case and thus affirm, we hold the Convention's limit on liability prospectively unenforceable in United States Courts.

SUMMARY OF THE ISSUES AND DECISION

The facts in this case, if nothing else, are clear cut. In March, 1979, plaintiffs Franklin Mint Corporation, Frank-

¹ The Warsaw Convention is formally known as the "Convention for the Unification of Certain Rules Relating to International Transportation by Air," opened for signature October 12, 1929, 49 Stat. 3000, T.S. No. 876, 137 L.N.T.S. 11 (adherence of the United States proclaimed October 29, 1934).

lin Mint Limited, and McGregor, Swire Air Services Limited (collectively, "Franklin Mint") contracted with defendant Trans World Airlines, Inc. ("TWA") for the carriage by air from the United States to England of 714 pounds of numismatic materials. Though the articles were worth more than \$6,500, Franklin Mint made no special declaration of value. The articles were either lost or destroyed, thus rendering TWA liable under Article 18 of the Convention.² Because of the absence of a special declaration, TWA sought to limit its liability under Article 22 of the Convention.

Article 22 limits the carrier's liability for injuries to both "checked baggage and . . . goods" and "objects of which the passenger takes charge himself."³ The various

² Article 18 of the Convention reads:

(1) The carrier shall be liable for damage sustained in the event of the destruction or loss of, or of damage to, any checked baggage or any goods, if the occurrence which caused the damage so sustained took place during the transportation by air.

(2) The transportation by air within the meaning of the preceding paragraph shall comprise the period during which the baggage or goods are in charge of the carrier, whether in an airport or on board an aircraft, or, in the case of a landing outside an airport, in any place whatsoever.

(3) The period of the transportation by air shall not extend to any transportation by land, by sea, or by river performed outside an airport. If, however, such transportation takes place in the performance of a contract for transportation by air, for the purpose of loading, delivery or transshipment, any damage is presumed, subject to proof to the contrary, to have been the result of an event which took place during the transportation by air.

³ Article 22 of the Convention reads:

(1) In the transportation of passengers the liability of the carrier for each passenger shall be limited to the sum of 125,000 francs. Where, in accordance with the law of the court to which the case is submitted, damages may be awarded in the form of periodical payments, the equivalent capital value of the

limits are stated in terms of a specified number of French gold or "Poincare" francs, a unit of account consisting of "65½ milligrams of gold at a standard fineness of nine hundred thousandths." The limit on baggage or other goods is 250 Poincare francs per kilogram. The dollar value of that limit is calculated simply by converting the gold value of the specified unit into United States dollars, *e.g.*, the limit per kilogram is 250 multiplied by the dollar value of 65½ milligrams of gold.

The difficulty arises from the fact that when Article 22 was drafted, gold served official monetary functions and its price was set by law. The Convention thus selected it as the unit of conversion in order to ensure judgments of uniform value as well as a stable and easily calculable limitation on liability. The plain but highly troublesome fact is that by international agreement and United States domestic legislation gold has now lost its monetary functions and no longer has an official price. Unfortunately for parties to international airline transactions as well as

said payments shall not exceed 125,000 francs. Nevertheless, by special contract, the carrier and the passenger may agree to a higher limit of liability.

(2) In the transportation of checked baggage and of goods, the liability of the carrier shall be limited to a sum of 250 francs per kilogram, unless the consignor has made, at the time when the package was handed over to the carrier, a special declaration of the value at delivery and has paid a supplementary sum if the case so requires. In that case the carrier will be liable to pay a sum not exceeding the declared sum, unless he proves that that sum is greater than the actual value to the consignor at delivery.

(3) As regards objects of which the passenger takes charge himself the liability of the carrier shall be limited to 5,000 francs per passenger.

(4) The sums mentioned above shall be deemed to refer to the French franc consisting of 65½ milligrams of gold at the standard of fineness of nine hundred thousandths. These sums may be converted into any national currency in round figures.

for us, the terms of Article 22 continue to utilize gold as the unit of conversion. Thus, the parties raise the issue of what unit of account is now to be used to convert judgments under the Convention into United States dollars.

In arguing the issue, the parties offer four alternatives: (i) the last official price of gold in the United States; (ii) the free market price of gold; (iii) the Special Drawing Right ("SDR"), a unit of account established by the International Monetary Fund ("IMF") and recently proposed as a substitute for gold in the as yet unratified Montreal Protocols to the Convention; and (iv) the exchange value of the current French franc. While acknowledging that "the arguments in favor of . . . the SDR [were] most persuasive," Judge Knapp nevertheless held that the last official price of gold was the appropriate standard. This choice was predicated on the view that this standard "has been . . . espoused by the Civil Aeronautics Board ("CAB"), the government agency most intimately concerned with the transaction at hand," and has been "used by all domestic carriers—including TWA—in calculating the dollar value of the Article 22 limitation printed on their tariffs." 525 F.Supp at 1289.

We share Judge Knapp's doubt about the result. Indeed, there are powerful arguments against each of the proffered solutions. The last official price of gold is a price which has been explicitly repealed by the Congress. See note 11, *infra*, and accompanying text. It thus lacks any status in law or relationship to contemporary currency values. The free market price of gold is the highly volatile price of a commodity determined in part by forces of supply and demand unrelated to currency values. SDR's are a creature of the IMF, modified at will by that body and having no basis in the Convention. The French franc is simply one domestic currency, subject to change by the unilateral act of a single government.

Every proffered solution thus appears to have a devastating argument against it. While the Convention has not been formally abrogated, enforcement by national judicial tribunals is impossible without their picking and choosing among alternative units of conversion according to their view of which is best as an initial policy matter. We have no power to select a new unit of account. We thus hold the Convention's limitation of liability unenforceable by United States Courts.

BACKGROUND

Drafted in the late 1920's, the Convention was designed both to protect the fledgling aviation industry from the alternatives of ruinous damage suits or exorbitant insurance premiums and to insure a certain degree of uniformity of legal obligation given the expected international character of the industry. See A. Lowenfeld and A. Mendelsohn, *The United States and the Warsaw Convention*, 80 Harvard L. Rev. 497, 499-501 (1967) (hereafter "Lowenfeld and Mendelsohn"); see also *Reed v. Wiser*, 555 F.2d 1079, 1089 (2d Cir.), cert. denied, 434 U.S. 922 (1977) and CAB Staff Memorandum, Warsaw Convention Liability Limits, March 18, 1980, at 5-6. (App. at 43-44). A series of rules governing liability, affirmative defenses and limitations accomplished the former goal, while the Convention's international scope accomplished the latter. Articles 17, 18 and 19 enunciate the carrier's liability for personal injuries, for damage or loss of baggage, and for damage due to delay. Articles 20 and 21 establish as affirmative defenses lack of fault and contributory negligence. Finally, Article 22 provides a limitation on the extent of liability for both personal injury and loss of luggage or other goods.

The personal injury limitations amounts have been subject to upward revision from time to time through protocols to the original agreement. These revisions have come in the wake of a continuing debate, with the de-

veloped countries, notably the United States, Great Britain and France, arguing for higher limits, and the less developed nations seeking reduction of the existing limit.⁴ Lowenfeld and Mendelsohn at 504. Throughout this period, the level of the limitations on liability for loss or destruction of checked baggage and other goods has remained the same.

Defining recoveries in terms of a specified amount of gold was intended to produce stability and uniformity. Such a common standard allowed the conversion of liability limits into national currencies and insulated recoveries from the vicissitudes of currency fluctuation and devaluation. In drafting the Convention, a proposal to fix recoveries purely in terms of the French franc was rejected by Switzerland on the ground that use of a single national currency rendered the liability limit subject to change by the act of one government. *See* Second Interna-

⁴ In 1955, at The Hague, the conferees would agree only to a doubling of the limit to 250,000 Poincare francs or \$16,600. Lowenfeld and Mendelsohn at 504-09. The United States unenthusiastically signed the Hague Protocol a year later, but did not present the treaty to the Senate until July 1959. Lowenfeld and Mendelsohn at 515. The Senate never ratified the Protocol because of its low limit, however, and ultimately the Kennedy/Johnson Administrations actually threatened United States denunciation of the Convention. This threat came in the wake of Congress' failure to enact a legislative package ratifying the Hague Protocol while compelling the purchase by all American air carriers of \$50,000 in insurance for each passenger. To avoid United States denunciation, a conference met in Montreal in the spring of 1966. The result of this meeting was the so-called Montreal Agreement "which provided for absolute carrier liability up to \$75,000 on all flights into or out of the United States." *Reed v. Wisner*, 555 F.2d at 1087. Appeased, the United States withdrew its denunciation. However, it continued to press for an amendment to the Convention raising personal injury liability limits. In 1971, the parties promulgated the Guatemala City Protocol under which personal injury limits were to be raised to \$100,000 at the then current exchange rate of \$35 per ounce of gold." *Id.* at 1089 n.12. However, the United States has not ratified that protocol.

tional Conference on Private Aeronautical Law, Minutes, October 4-12, 1929, Warsaw, at 88-89 (Horner and Legrez trans. 1975), (App. at 247-248). As the Swiss delegate put it, "Naturally one can say 'French franc' but . . . its [France's] national law which determines it, and one need have only a modification of the national law to overturn the essence of this provision." *Id.* at 89-90, (App. at 248-249). Accordingly, the Swiss pressed for a standard which tied the limitation to a gold value regardless of the national currency actually named in the article. *Id.* at 90, (App. at 249). The conferees accepted the Swiss position and stated the limitation in terms of the Poincare franc defined as "65½ milligrams of gold at a standard fineness of nine hundred thousandths." Convention, art. 22 § (4).⁸

From October, 1934, when the United States first adhered to the Convention, until 1978, use of gold as unit of account posed no problem for United States Courts or the judicial tribunals of other signatory nations. In 1934, the value of gold was set at \$35 per troy ounce pursuant to statute, United States Gold Reserve Act of 1934, Pub. L. No. 73-87, 48 Stat. 337 (1934). When the United States became a party to the International Monetary Fund (IMF) in 1945, *see* Bretton Woods Agreements Act, ch. 339, § 2, Pub. L. No. 79-171, 59 Stat. 512 (1945) (codified at 22 U.S.C. § 286 (1976)), it promised to maintain (and, if necessary, redeem) the value of United States dollars

⁸ There was only one change made in this standard at the Hague in 1955. To avoid any confusion, the conferees deleted reference to the Poincare franc and defined the specified sums as referring "to a currency unit consisting of sixty-five and a half milligrams of gold of millesimal fineness nine hundred." Asser, *Golden Limitations of Liability in International Transport Conventions and the Currency Crisis*, 5 J. Mar. L. & Com. 645, 647-48 n.7 (1974). Since the United States never ratified the Hague Protocol, the old language still governs American courts. That change, however, is entirely formal, since the elimination of any reference to the French franc merely clarified the Convention's desire to use gold, a point never doubted in the United States.

in terms of gold. For purposes of the Convention's limits on liability, therefore, the relationship of gold and the dollar allowed judicial tribunals to award judgments on a stable, uniform basis.

At the time of Bretton Woods, the United States dollar was grossly undervalued and was actually an asset more valuable than gold. The promise to redeem all dollars in gold could thus be made without having to be fulfilled.⁶ From 1955, however, the United States faced a persistent balance of payments deficit. Where once there existed a dollar shortage, there now developed a dollar glut.⁷ To compensate, central banks abroad began trading their dollars for gold, and hoarders and speculators began accumulating the metal in increasing amounts. From 1955 to 1968, United States gold reserves plummeted from approximately \$24 billion to around \$10 billion.⁸

These events led ultimately to the demise of the gold standard. In early 1968, depletion of the United States gold reserve led the central banks of Belgium, the Federal Republic of Germany, Italy, the Netherlands, Switzerland, the United Kingdom and the United States to agree to discontinue supplying gold to private markets. A so-called "two-tier" system of gold pricing—a market price set accordingly and the official price set under Bretton Woods⁹—was thus created. This eased the pressure but could not remedy the essential flaw. In addition to persistent United States balance of payment deficits, international gold reserves grew more slowly than the volume of world economic activity. As a consequence, banks faced

⁶ See P. Samuelson, *Economics*, 686-88 (8th ed. 1970).

⁷ *Id.* at 690-91.

⁸ *Id.* at 691, Figure 36-1.

⁹ See Asser, *supra* note 6, at 650; Gold, *International Monetary Law: Change, Uncertainty and Ambiguity*, 15 J. Int'l L. & Econ. 323, 340-41; Samuelson, *supra* note 7, at 698-99.

pressures to liquidate official holdings in light of readily available market profits. The stage was thus set for abandonment of the Bretton Woods arrangements.

In August, 1971, the United States suspended its commitment to convert dollars for gold.¹⁰ In May, 1972, it devalued the dollar by raising the official price of gold to \$38 per ounce. *See* Par Value Modification Act, Pub. L. No. 92-268, § 2, 86 Stat. 116 (1972) (formerly codified at 31 U.S.C. § 449 (1972)). In October, 1973, yet another devaluation raised the price to \$42.22 per ounce. *See* Par Value Modification Act, amendments, Pub. L. No. 93-110, § 1, 87 Stat. 352 (1973) (formerly codified at 31 U.S.C. § 449 (1976)).

The dollar's troubles led the IMF to put forth a plan to abolish the official price of gold, to delete references to gold in its articles, and to substitute SDR's as the Fund's reserve asset and unit of account. The plan was proposed in the 1976 Jamaica Accords, was passed by the Fund's members and became effective April 1, 1978. In the interim, the United States passed implementing legislation including a repeal of the Par Value Modification Act of 1973 and the abolition of the official price of gold.¹¹ Along with the Jamaica Accords, the measure also became effective on April 1, 1978.

This radical change in the international monetary system created an obvious problem under the Warsaw Convention. With gold abandoned as a currency base and the official price repealed, gold became a commodity with a

¹⁰ *Id.* at 641; Asser, *supra* note 6, at 651.

¹¹ In repealing the official price generally, Congress retained its use for the limited purpose of determining the value of gold held in the form of certificates. See 31 U.S.C. § 4056. The Senate noted that this was the "only domestic purpose for which it is necessary to define a fixed relationship between the dollar and gold . . ." S. Rep. No. 94-1295, 94th Cong., 2d Sess. 18, reprinted in [1976] U.S. Code Cong. & Ad. News 5935, 5966-67.

daily fluctuating free market price. That the difficulty in continuing to use gold as a monetary base undermined the Convention's unit of conversion was immediately recognized. Thus, the Warsaw conferees met in Montreal in 1975, even before the Jamaica Accords, and drafted and signed a Protocol substituting SDR's as the Convention's unit of conversion. At the time of the proposal, the SDR was calculated in terms of gold.¹² With the Jamaica Accords, the referent was changed to a basket of 16 national currencies, and in January, 1981, the basket was reduced to five currencies.¹³ The Montreal Protocol was presented to the United States Senate in January, 1977 but has not been ratified.

Meanwhile, parties to the Convention have utilized a variety of units of conversion. The record shows Sweden and Britain have adopted SDR's for purposes of Warsaw.¹⁴ Both a Netherlands court and the Civil Court of Rome reached the same result.¹⁵ Two French courts have recently decided that the Warsaw unit is to be converted simply into the current French franc.¹⁶ The United States

¹² Gold, *supra* note 10, at 345.

¹³ Ward, *The SDR in Transport Liability Conventions: Some Clarifications*, 13 J. Mar. L. & Com. 1, 3 (1981).

¹⁴ See Sweden's Carriage by Air Act (1957), amendment to Chapter 9, § 22, effective April 27, 1978, (translated and reprinted in App. at 57-61); see also the British Carriage by Air (Sterling Equivalents) Order of 1980, Statutory Instrument 1980 No. 281, effective March 21, 1980, (reprinted in App. at 62-63).

¹⁵ *State of the Netherlands v. Giant Shipping Corp.*, Rechtspraak van de Week, 30, May, 1981, 321 (Supreme Court of the Netherlands, May 1, 1981) (translated and reprinted in App. at 64-93); *Linee Aerea Italiane v. Ricciole* (Rome Civil Court Judgment 609/1979, Nov. 14, 1978), (translated and reprinted in App. at 95-108).

¹⁶ See *Chamie v. Egyptiar* (Cours d'appel Paris, Jan. 31, 1980) (translated and reprinted in App. at 171-91); *Pakistan Int'l Airlines v. Compagnie Air Inter. S.A.*, (Cours d'appel Aix-en-Provence Oct. 31, 1981) (translated and reprinted in App. at 156-70).

District Court in the Southern District of Texas recently opted for the free market price of gold,¹⁷ the standard utilized by an Indian court,¹⁸ and a Greek court.¹⁹ Finally, the last official price of gold, chosen by the District Court in this case, was relied upon by Judge Sifton in *In re Air Crash Disaster at Warsaw Poland on March 14, 1980*, 535 F. Supp. 833 (E.D.N.Y. 1982) and is still utilized by the CAB pursuant to a 1974 order.

DISCUSSION

The controlling facts in this case are: (i) enforcement of the Convention's limitation on liability requires a unit of conversion to translate judgments into domestic currency; (ii) there is no longer an internationally agreed upon unit of conversion; and (iii) there is no United States legislation specifying a unit to be used by United States Courts.

The need for a unit of conversion is self-evident. Without it, a rational limit on liability cannot exist, much less one which produces judgments of equal value in different currencies.

The lack of an internationally agreed upon unit is also obvious. The very convening of the Montreal meeting in 1975 was a recognition by the Warsaw parties that the Convention's unit had been eliminated by events. In plain fact, different countries now apply different units. Although the alternatives argued before us yield limitations

¹⁷ *Boehringer Mannheim Diagnostics, Inc. f/k/a Hycel, Inc. v. Pan American World Airways, Inc.*, 531 F.Supp. 344 (S.D. Tex. 1981).

¹⁸ *Kuwait Airways Corp. v. Sanghi*, Regular Appeal No. 54 of 1977 (Civil Station, Bangalore, India, August 11, 1978) (reprinted in App. at 265-71.)

¹⁹ *Zakoapolos v. Olympic Airways Corp.*, No. 256 of 1974 Ct. of App.; 3d Dep't., Athens, Greece (February 15, 1974) (translated and reprinted in App. at 251-54.)

on TWA's liability in this case ranging from less than \$6,500 to over \$400,000, each has been adopted as the proper unit of account by at least one party, or domestic tribunal of a party, to the Convention. This disarray merely confirms the obvious fact that the Jamaica Accords destroyed the international arrangements which had led to adoption of gold as a unit of conversion.

International disarray is also reflected in the lack of legislation in the United States implementing the Convention by establishing a unit of conversion. While the "last" official price of gold is offered as a possible unit, "last" is really an euphemism for "no longer" or "repealed." The repeal of the Par Value Modification Act in 1978 was in every sense a legislative declaration that the price of \$42.22 per troy ounce was no longer recognized by the United States.²⁰ We fail to see the logic in adopting as a legal standard a specified value for gold which has been specifically rejected by the United States Congress. Congress' action, moreover, as well as that taken by the other parties to the Jamaica Accords, is highly relevant to the Convention. The repeal of the Par Value Modification Act was based on a domestic and international conclusion that the official price of gold was wholly out of touch with economic and monetary reality. Since use of a fixed amount of gold as the Convention's unit was specifically designed to establish a limitation level at a certain value, this repeal must be taken as a statement that the official price no longer reflects that specified value. The case for continuing to use the now repealed price of gold thus finds no support in law or logic.

The CAB order on which Judge Knapp relied was expressly premised on the existence of an official price under the Par Value Modification Act of 1973. The more recent

²⁰ The sole remaining use of the last official price is in determining the value of gold held in the form of gold certificates. See note 12, *supra*. That is not relevant to the issues here.

internal CAB memorandum supporting continuation of that order is based ultimately on a policy determination that the last official price is the best available standard.²¹ The inconsistency of the CAB position, however, is starkly evident. It rejects SDR's because the Senate has not ratified the Montreal Protocol, while adopting the last official price of gold which has been explicitly rejected by the Congress. The sole criterion supporting the CAB's position appears to be the law of inertia.

The other alternatives have an equally infirm base. Neither the free market price of gold nor the current French franc was ever agreed to by the treaty's framers, both are gross departures from its purposes, and, as to the latter, there is ample evidence that it was specifically rejected. The framers clearly contemplated use of the governmentally fixed price of gold in adopting it as a unit of account in the hope of providing stability. The free market price of gold, however, is simply the daily fluctuating price of a commodity, affected by conditions relating to supply and nonmonetary uses affecting demand.²² The current French franc is similarly flawed. To enforce it would amount to a deliberate departure from the expressed wishes of the framers to avoid the use of a single national currency subject to unilateral action.

TWA argues that we should adopt the International Monetary Fund's SDR as the unit of conversion. It is true that the SDR was "created by the IMF in 1969 to replace gold and the foreign exchange as an international reserve asset."²³ "[M]ember central banks may exchange SDR's

²¹ CAB Internal Memorandum, Warsaw Convention Liability Limits, May 20, 1981 (App. at 32-38).

²² Appellant's reliance on dicta in our decision *Reed v. Wiser*, 555 F.2d at 1089 n.12, is misplaced. The *Reed* footnote implied a free market standard under the Guatemala City Protocol which the U.S. has not ratified.

²³ Ward, *supra* note 14, at 2.

for other convertible currencies and, therefore, SDR balances are actually lines of credit against which reserves may be borrowed for use in central bank operations.”²⁴ As noted above, methods of calculating SDR’s have been changed from time to time. They are presently calculated with reference to a so-called basket of five currencies—the U.S. dollar, the Deutsche mark, the French franc, the Japanese yen, and the pound sterling. The amount of each currency in one SDR is a function of the percentage weights which are assigned to each currency in the basket. The dollar value of one SDR is then determined by adding the “dollar values of each currency component based on daily market exchange rates.”²⁵

Though the value of any one currency in terms of SDR’s fluctuates from day to day, SDR fluctuations are generally less extreme than fluctuations in the free market price of gold. The relative stability of the SDR has thus led the Warsaw signatories to propose its substitution as the Convention’s unit of account. The proposal was formally drafted in 1975 as part of the Montreal Protocols to the Convention and has been presented to the signatory states for ratification. Though the substitution was supported by the United States, there has been opposition by non-IMF signatories and very few signatories (the United States included) have actually ratified the Protocol.

The inappropriateness of our adopting SDR’s as the unit of conversion is plain. The Convention itself contains not the slightest authority for its use and the Senate has thus far declined to ratify the Montreal Protocols. Moreover, the decision in principle to use SDR’s is only the first step. After that, a further step must be taken to define the limitation of liability in terms of a particular number of SDR’s per kilogram of baggage. In effect, we

²⁴ *Id.*

²⁵ *Id.* at 2.

would have to set the level of the limitation. Finally, the SDR is a creature of an international body, the IMF, and is subject to modification or outright elimination by that body. In fact, the method of calculating SDR's has been changed three times in the last seven years. This Court has no power under the terms of the Convention or relevant domestic source of authority to adopt a unit of conversion variable at the whim of an international body distinct from the parties to the Convention.

It is thus clear that neither international nor domestic sources of law specify a unit of account for purposes of the Convention. We deal here not with ambiguities which may be clarified by reference to underlying purpose or with language which inadequately mirrors the understood intentions of the drafters. For almost two generations, the Convention's limits on liability have been translatable into domestic currency values by application of a clear and easily applied formula. An essential ingredient of that formula has, as a consequence of international action followed by domestic legislation, ceased to exist. What the parties ask us to do is to select, upon the basis of our judgment as to what is best as a matter of policy, a new unit of conversion. We are without authority to do so.

Treaty negotiation and proposal is the province of the executive and ratification is the exclusive province of the United States Senate. U.S. Const. art. II, § 2, cl. 1; *Doe ex dem. Clark et al. v. Braden*, 16 How. 635, 656-57 (1853). While federal courts are necessarily called upon to interpret treaties, *The Federalist* No. 3 (J. Jay) (Rossiter ed. 1961); see also *id.* No. 80 (A. Hamilton), they must observe the line between treaty interpretation on the one hand and negotiation, proposal and ratification on the other. See *Baker v. Carr*, 369 U.S. 186, 211-12 (1961). To be sure, great difficulty may arise in ascertaining where that line is drawn and when it has been crossed.²⁶ See,

²⁶ Given the lack of an internationally agreed upon standard of conversion, it might be argued that the Convention has been abro-

e.g., *Goldwater v. Carter*, 444 U.S. 996 (1979). However, selection of a unit of conversion and the level of value of a limitation on liability is plainly a matter to be negotiated by the parties, as the history of the Convention demonstrates.

While international disarray as to the proper unit of conversion under the Convention alone might not disable us from enforcing a new unit, such a unit must be selected either through treaty ratification by the Senate or by legislation passing both Houses of the Congress. The repeal of the Par Value Modification Act was an explicit abandonment of the previously established unit of conversion. While Congress may not have focused explicitly upon the Convention in repealing that Act, its purpose, abandonment of a price which was out of touch with economic reality, plainly encompasses use of that price to convert judgments to United States currency values. Congress thus abandoned the unit of conversion specified by the Convention and did not substitute a new one. Substitution of a new term is a political question, unfit for judicial resolution. We hold, therefore, that the Convention's limits on liability for loss of cargo are unenforceable in United States Courts.²⁷

gated. However, treaties involve international obligations entered into by coordinate branches of the government and it is not the province of courts to declare treaties abrogated or to afford relief to those (including the parties) who wish to escape their terms. These are not matters for "judicial cognizance." *Whitney v. Robinson*, 124 U.S. 190, 194 (1887); see also *Terlinden v. Ames*, 184 U.S. 270 (1901). They belong to the executive and legislative departments because they are more properly the domain of "diplomacy and legislation, . . . not . . . the administration of laws." *Whitney v. Robertson*, 124 U.S. at 195.

²⁷ The Convention establishes liability as well as limits it. Note 2, *supra*. Our holding is limited solely to the unenforceability of the limits and we express no view as to the severability of those limits from the rest of the Convention.

CONCLUSION

This ruling is prospective and will apply only to events creating liability occurring 60 days from the issuance of the mandate in this case. Prospective effect is compelled by the fact that this is the first case in which a court has declined to enforce the Convention's limits on liability. The parties assumed our power to select a new unit and thus our "resolution was not clearly foreshadowed." *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106 (1971). Parties to transactions covered by the Convention should have time to adjust their affairs to this ruling. Cf. *Northern Pipeline Construction Co. v. Marathon Pipeline Co.*, 50 U.S.L.W. 4892 (U.S. June 28, 1982) (judgment holding Bankruptcy Act unconstitutional stayed until October 4, 1982). As to events occurring before that date, we hold that the last official price of gold shall be used to calculate the limits on liability. Because of both the CAB ruling discussed above and the lack of alternatives, air carriers, at least in this country, have relied on the last official price of gold. All carriers have thus filed tariffs that comply with that standard and substantial "injustice and hardship" would result were they not allowed time to reformulate those tariffs. Other parties may continue to protect themselves through insurance.

Affirmed.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

81 Civ. 1700 (WK)

FRANKLIN MINT CORPORATION,
FRANKLIN MINT LIMITED, and
MCGREGOR, SWIRE AIR SERVICES, LIMITED,
Plaintiffs,

—against—

TRANS WORLD AIRLINES, INC.,
Defendant.

MEMORANDUM AND ORDER

WHITMAN KNAPP, D.J.

On March 23, 1979, plaintiff Franklin Mint Corporation ("Franklin") delivered to defendant Trans World Airlines, Inc. ("TWA") for carriage from Philadelphia, Pennsylvania to London's Heathrow Airport, four packages weighing some 714 pounds. Although the packages are said to have contained a large quantity of valuable coins, Franklin made no special declaration of value at the time of delivery. TWA charged Franklin \$544.96 for the shipment. The four packages never arrived at their destination, and Franklin brought this action to recover their full value, which it fixes at \$250,000. The parties agree that this action is governed by the terms of the Warsaw Convention, and that TWA is liable for the loss. Before us is a motion by TWA for partial summary judgment as to the extent of its liability. We grant that motion in part and deny it in part.

Article 22 of the Warsaw Convention provides that, unless a special declaration of value is made at the time of delivery, a shipper's liability for checked baggage and goods is limited to the equivalent of 250 francs per kilogram. Article 22 states, moreover, that this limitation of 250 francs:

"shall be deemed to refer to the French franc consisting of 65½ milligrams of gold at the standard of fineness of nine hundred thousandths [the so-called Poincare franc]. These sums may be converted into any national currency in round figures." (Emphasis added.)

Counsel for TWA, in an extraordinary lucid and comprehensive brief, has suggested three possible bases for the calculation converting the Article 22 limitation into United States dollars: (1) the Special Drawing Right ("SDR"), used by members of the International Monetary Fund ("IMF") as a unit of account; (2) the last official price of gold in the United States; and (3) the exchange value of the current French franc. Counsel for Franklin, in an equally able brief, suggests a fourth possibility: the free market price of gold.

Were we writing on a clean slate, we would find the arguments in favor of the first of TWA's suggestions (the SDR) most persuasive. However, TWA's second suggestion (the last official price of gold in the United States) has—arguably, at least—been espoused by the Civil Aeronautics Board ("CAB"), the government agency most intimately concerned with the transaction at hand. It therefore comes as close as anything to constituting a governmental interpretation of the Article 22 limitation. Also, it is used by all domestic carriers—including TWA—in calculating the dollar value of the Article 22 limitation printed on their tariffs. It would seem to follow that the parties intended to adopt the last official price of gold as the basis for converting the Article 22 limitation into dollars in the instant case.

Beyond saying the foregoing we can, since there are no disputed issues of fact upon which a finding by us is required, see no purpose to be served by delaying a decision while we seek to put in our own words the arguments so cogently expressed by counsel for TWA. Accordingly, we simply adopt those arguments to the extent that they support our conclusion that the conversion should be premised on the last official price of gold in the United States.

Let counsel for TWA submit a proposed order on ten days notice. As we understand the stipulation of the parties, such an order would in effect direct that judgment be entered for plaintiff in the amount of \$6,475.98 plus interest and costs, a result which would permit immediate appeal from this order.

SO ORDERED.

Dated:

New York, New York
November 6, 1981

/s/ Whitman Knapp
WHITMAN KNAPP
U.S.D.J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

81 Civ. 1700 (WK)

FRANKLIN MINT CORPORATION,
FRANKLIN MINT LIMITED, and
MCGREGOR, SWIRE AIR SERVICES, LIMITED,
—against— *Plaintiffs,*

TRANS WORLD AIRLINES, INC.,
Defendant.

[Filed Dec. 4, 1981]

ORDER AND JUDGMENT

For the reasons stated in the Memorandum and Order of this Court, dated November 6, 1981, it is

ORDERED, ADJUDGED AND DECREED: that the maximum liability herein of defendant Trans World Airlines, Inc. shall be determined under Article 22 of the Convention for the Unification of Certain Rules Relating to International Transportation by Air, 49 Stat. 3000 *et seq.* (1934), T.S. 876, *reprinted in* 49 U.S.C. § 1502 note (1970), by a conversion factor premised on the last official price of gold in the United States, and it is

FURTHER ORDERED, that in accordance with the foregoing conversion factor, final judgment shall be entered for plaintiffs in the amount of \$6,475.98, plus interest and costs.

Dated:

New York, New York
December 3, 1981

s/ Whitman Knapp
WHITMAN KNAPP
U.S.D.J.

Judgment Entered 12/4/81

/s/ _____
Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

81 Civ. 1700 (WK)

FRANKLIN MINT CORPORATION,
FRANKLIN MINT LIMITED, and
MCGREGOR, SWIRE AIR SERVICES, LIMITED,
Plaintiffs,
—against—

TRANS WORLD AIRLINES, INC.,
Defendant.

ORDER

WHITMAN KNAPP, D.J.

The first sentence of the second paragraph of our November 6, 1981 Memorandum and Order is hereby amended to read:

"Article 22 of the Warsaw convention provides that, unless a special declaration of value is made at the time of a delivery, a carrier's liability for checked baggage and goods is limited to the equivalent of 250 francs per kilogram."

SO ORDERED.

Dated: New York, New York
December 18, 1981

WHITMAN KNAPP, U.S.D.J.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-eighth day of September one thousand nine hundred and eighty-two.

Present:

HON. JAMES L. OAKES
HON. RICHARD J. CARDAMONE
HON. RALPH K. WINTER

Circuit Judges,

#82-7012

FRANKLIN MINT CORPORATION,
FRANKLIN MINT LIMITED, and
MCGREGOR, SWIRE AIR SERVICES LIMITED,
Plaintiffs-Appellants,

v.

TRANS WORLD AIRLINES, INC.,
Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of New York

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed in accordance with the opinion of this court with costs to be taxed against the appellants.

A. DANIEL FUSARO
Clerk

by /s/ Arthur Heller
ARTHUR HELLER
Deputy Clerk

APPENDIX D

WARSAW CONVENTION

49 Stat. 3000, T. S. 876

CONVENTION FOR UNIFICATION OF CERTAIN
RULES RELATING TO INTERNATIONAL
TRANSPORTATION BY AIR

The President of the German Reich, the Federal President of the Republic of Austria, His Majesty the King of the Belgians, the President of the United States of Brazil, His Majesty the King of the Bulgarians, the President of the Nationalist Government of China, His Majesty the King of Denmark and Iceland, His Majesty the King of Egypt, His Majesty the King of Spain, the Chief of State of the Republic of Estonia, the President of the Republic of Finland, the President of the French Republic, His Majesty the King of Great Britain, Ireland, and the British Dominions beyond the Seas, Emperor of India, the President of the Hellenic Republic, His Most Serene Highness the Regent of the Kingdom of Hungary, His Majesty the King of Italy, His Majesty the Emperor of Japan, the President of the Republic of Latvia, Her Royal Highness the Grand Duchess of Luxemburg, the President of the United Mexican States, His Majesty the King of Norway, Her Majesty the Queen of the Netherlands, the President of the Republic of Poland, His Majesty the King of Rumania, His Majesty the King of Sweden, the Swiss Federal Council, the President of the Czechoslovak Republic, the Central Executive Committee of the Union of Soviet Socialist Republics, the President of the United States of Venezuela, His Majesty the King of Yugoslavia:

Having recognized the advantage of regulating in a uniform manner the conditions of international transportation by air in respect of the documents used for such transportation and of the liability of the carrier.

Have nominated to this end their respective Plenipotentiaries, who, being thereto duly authorized, have concluded and signed the following convention:

CHAPTER I. SCOPE—DEFINITIONS

Article 1

(1) This convention shall apply to all international transportation of persons, baggage, or goods performed by aircraft for hire. It shall apply equally to gratuitous transportation by aircraft performed by an air transportation enterprise.

(2) For the purposes of this convention the expression "international transportation" shall mean any transportation in which, according to the contract made by the parties, the place of departure and the place of destination, whether or not there be a break in the transportation or a transshipment, are situated either within the territories of two High Contracting Parties, or within the territory of a single High Contracting Party, if there is an agreed stopping place within a territory subject to the sovereignty, suzerainty, mandate or authority of another power, even though that power is not a party to this convention. Transportation without such an agreed stopping place between territories subject to the sovereignty, suzerainty, mandate, or authority of the same High Contracting Party shall not be deemed to be international for the purposes of this convention.

(3) Transportation to be performed by several successive air carriers shall be deemed, for the purposes of this convention, to be one undivided transportation, if it has been regarded by the parties as a single operation, whether it has been agreed upon under the form of a single contract or of a series of contracts, and it shall not lose its international character merely because one contract or a series of contracts is to be performed entirely within a territory subject to the sovereignty, suzerainty, mandate, or authority of the same High Contracting Party.

Article 2

(1) This convention shall apply to transportation performed by the state or by legal entities constituted under public law provided it falls within the conditions laid down in article 1.

(2) This convention shall not apply to transportation performed under the terms of any international postal convention.

CHAPTER II. TRANSPORTATION DOCUMENTS

SECTION I. PASSENGER TICKET

Article 3

(1) For the transportation of passengers the carrier must deliver a passenger ticket which shall contain the following particulars:

(a) The place and date of issue;

(b) The place of departure and of destination;

(c) The agreed stopping places, provided that the carrier may reserve the right to alter the stopping places in case of necessity, and that if he exercises that right, the alteration shall not have the effect of depriving the transportation of its international character;

(d) The name and address of the carrier or carriers;

(e) A statement that the transportation is subject to the rules relating to liability established by this convention.

(2) The absence, irregularity, or loss of the passenger ticket shall not affect the existence or the validity of the contract of transportation, which shall none the less be subject to the rules of this convention. Nevertheless, if the carrier accepts a passenger without a passenger ticket having been delivered he shall not be entitled to

avail himself of those provisions of this convention which exclude or limit his liability.

SECTION II. BAGGAGE CHECK

Article 4

(1) For the transportation of baggage, other than small personal objects of which the passenger takes charge himself, the carrier must deliver a baggage check.

(2) The baggage check shall be made out in duplicate, one part for the passenger and the other part for the carrier.

(3) The baggage check shall contain the following particulars:

(a) The place and date of issue;

(b) The place of departure and of destination;

(c) The name and address of the carrier or carriers;

(d) The number of the passenger ticket;

(e) A statement that delivery of the baggage will be made to the bearer of the baggage check;

(f) The number and weight of the packages;

(g) The amount of the value declared in accordance with article 22(2);

(h) A statement that the transportation is subject to the rules relating to liability established by this convention.

(4) The absence, irregularity, or loss of the baggage, check shall not affect the existence or the validity of the contract of transportation which shall none the less be subject to the rules of this convention. Nevertheless, if the carrier accepts baggage without a baggage check having been delivered, or if the baggage check does not contain the particulars set out at (d), (f), and (h) above, the carrier shall not be entitled to avail himself of those pro-

visions of the convention which exclude or limit his liability.

SECTION III. AIR WAYBILL

Article 5

(1) Every carrier of goods has the right to require the consignor to make out and hand over to him a document called an "air waybill": every consignor has the right to require the carrier to accept this document.

(2) The absence, irregularity, or loss of this document shall not affect the existence or the validity of the contract of transportation which shall, subject to the provisions of article 9, be none the less governed by the rules of this convention.

Article 6

(1) The air waybill shall be made out by the consignor in three original parts and be handed over with the goods.

(2) The first part shall be marked "for the carrier", and shall be signed by the consignor. The second part shall be marked "for the consignee"; it shall be signed by the consignor and by the carrier and shall accompany the goods. The third part shall be signed by the carrier and handed by him to the consignor after the goods have been accepted.

(3) The carrier shall sign on acceptance of the goods.

(4) The signature of the carrier may be stamped; that of the consignor may be printed or stamped.

(5) If, at the request of the consignor, the carrier makes out the air waybill, he shall be deemed, subject to proof to the contrary, to have done so on behalf of the consignor.

Article 7

The carrier of goods has the right to require the consignor to make out separate waybills when there is more than one package.

Article 8

The air waybill shall contain the following particulars:

- (a) The place and date of its execution;
- (b) The place of departure and of destination;
- (c) The agreed stopping places, provided that the carrier may reserve the right to alter the stopping places in case of necessity, and that if he exercises that right the alteration shall not have the effect of depriving the transportation of its international character;
- (d) The name and address of the consignor;
- (e) The name and address of the first carrier;
- (f) The name and address of the consignee, if the case so requires;
- (g) The nature of the goods;
- (h) The number of packages, the method of packing, and the particular marks or numbers upon them;
- (i) The weight, the quantity, the volume, or dimensions of the goods;
- (j) The apparent condition of the goods and of the packing;
- (k) The freight, if it has been agreed upon, the date and place of payment, and the person who is to pay it;
- (l) If the goods are sent for payment on delivery, the price of the goods, and, if the case so requires, the amount of the expenses incurred;
- (m) The amount of the value declared in accordance with article 22(2);
- (n) The number of parts of the air waybill;
- (o) The documents handed to the carrier to accompany the air waybill;

(p) The time fixed for the completion of the transportation and a brief note of the route to be followed, if these matters have been agreed upon;

(q) A statement that the transportation is subject to the rules relating to liability established by this convention.

Article 9

If the carrier accepts goods without an air waybill having been made out, or if the air waybill does not contain all the particulars set out in article 8(a) to (i), inclusive, and (q), the carrier shall not be entitled to avail himself of the provisions of this convention which exclude or limit his liability.

Article 10

(1) The consignor shall be responsible for the correctness of the particulars and statements relating to the goods which he inserts in the air waybill.

(2) The consignor shall be liable for all damages suffered by the carrier or any other person by reason of the irregularity, incorrectness or incompleteness of the said particulars and statements.

Article 11

(1) The air waybill shall be *prima facie* evidence of the conclusion of the contract, of the receipt of the goods and of the conditions of transportation.

(2) The statements in the air waybill relating to the weight, dimensions, and packing of the goods, as well as those relating to the number of packages, shall be *prima facie* evidence of the facts stated; those relating to the quantity, volume and condition of the goods shall not constitute evidence against the carrier except so far as they both have been, and are stated in the air waybill to have been, checked by him in the presence of the consignor, or relate to the apparent condition of the goods.

Article 12

(1) Subject to his liability to carry out all his obligations under the contract of transportation, the consignor shall have the right to dispose of the goods by withdrawing them at the airport of departure or destination, or by stopping them in the course of the journey on any landing, or by calling for them to be delivered at the place of destination, or in the course of the journey to a person other than the consignee named in the air waybill, or by requiring them to be returned to the airport of departure. He must not exercise this right of disposition in such a way as to prejudice the carrier or other consignors, and he must repay any expenses occasioned by the exercise of this right.

(2) If it is impossible to carry out the orders of the consignor the carrier must so inform him forthwith.

(3) If the carrier obeys the orders of the consignor for the disposition of the goods without requiring the production of the part of the air waybill delivered to the latter, he will be liable, without prejudice to his right of recovery from the consignor, for any damage which may be caused thereby to any person who is lawfully in possession of that part of the air waybill.

(4) The right conferred on the consignor shall cease at the moment when that of the consignee begins in accordance with article 13, below. Nevertheless, if the consignee declines to accept the waybill or the goods, or if he cannot be communicated with, the consignor shall resume his right of disposition.

Article 13

(1) Except in the circumstances set out in the preceding article, the consignee shall be entitled, on arrival of the goods at the place of destination, to require the carrier to hand over to him the air waybill and to deliver the goods to him, on payment of the charges due and on

complying with the conditions of transportation set out in the air waybill.

(2) Unless it is otherwise agreed, it shall be the duty of the carrier to give notice to the consignee as soon as the goods arrive.

(3) If the carrier admits the loss of the goods, or if the goods have not arrived at the expiration of seven days after the date on which they ought to have arrived, the consignee shall be entitled to put into force against the carrier the rights which flow from the contract of transportation.

Article 14

The consignor and the consignee can respectively enforce all the rights given them by articles 12 and 13, each in his own name, whether he is acting in his own interest or in the interest of another, provided that he carries out the obligations imposed by the contract.

Article 15

(1) Articles 12, 13, and 14 shall not affect either the relations of the consignor and the consignee with each other or the relations of third parties whose rights are derived either from the consignor or from the consignee.

(2) The provisions of articles 12, 13, and 14 can only be varied by express provision in the air waybill.

Article 16

(1) The consignor must furnish such information and attach to the air waybill such documents as are necessary to meet the formalities of customs, octroi, or police before the goods can be delivered to the consignee. The consignor shall be liable to the carrier for any damage occasioned by the absence, insufficiency, or irregularity of any such information or documents, unless the damage is due to the fault of the carrier or his agents.

(2) The carrier is under no obligation to enquire into the correctness or sufficiency of such information or documents.

CHAPTER III. LIABILITY OF CARRIER

Article 17

The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

Article 18

(1) The carrier shall be liable for damage sustained in the event of the destruction or loss of, or of damage to, any checked baggage or any goods, if the occurrence which caused the damage so sustained took place during the transportation by air.

(2) The transportation by air within the meaning of the preceding paragraph shall comprise the period during which the baggage or goods are in charge of the carrier, whether in an airport or on board an aircraft, or, in the case of a landing outside an airport, in any place whatsoever.

(3) The period of the transportation by air shall not extend to any transportation by land, by sea, or by river performed outside an airport. If, however, such transportation takes place in the performance of a contract for transportation by air, for the purpose of loading, delivery or transshipment, any damage is presumed, subject to proof to the contrary, to have been the result of an event which took place during the transportation by air.

Article 19

The carrier shall be liable for damage occasioned by delay in the transportation by air of passengers, baggage, or goods.

Article 20

(1) The carrier shall not be liable if he proves that he and his agents have taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures.

(2) In the transportation of goods and baggage the carrier shall not be liable if he proves that the damage was occasioned by an error in piloting, in the handling of the aircraft, or in navigation and that, in all other respects, he and his agents have taken all necessary measures to avoid the damage.

Article 21

If the carrier proves that the damage was caused by or contributed to by the negligence of the injured person the court may, in accordance with the provisions of its own law, exonerate the carrier wholly or partly from his liability.

Article 22

(1) In the transportation of passengers the liability of the carrier for each passenger shall be limited to the sum of 125,000 francs. Where, in accordance with the law of the court to which the case is submitted, damages may be awarded in the form of periodical payments, the equivalent capital value of the said payments shall not exceed 125,000 francs. Nevertheless, by special contract, the carrier and the passenger may agree to a higher limit of liability.

(2) In the transportation of checked baggage and of goods, the liability of the carrier shall be limited to a sum of 250 francs per kilogram, unless the consignor has made, at the time when the package was handed over to the carrier, a special declaration of the value at delivery and has paid a supplementary sum if the case so requires. In that case the carrier will be liable to pay a sum not exceeding the declared sum, unless it proves that the sum is greater than the actual value to the consignor at delivery.

(3) As regards objects of which the passenger takes charge himself the liability of the carrier shall be limited to 5,000 francs per passenger.

(4) The sums mentioned above shall be deemed to refer to the French franc consisting of 65½ milligrams of gold at the standard of fineness of nine hundred thousandths. These sums may be converted into any national currency in round figures.

Article 23

Any provision tending to relieve the carrier of liability or to fix a lower sum than that which is laid down in this convention shall be null and void, but the nullity of any such provision shall not involve the nullity of the whole contract which shall remain subject to the provisions of this convention.

Article 24

(1) In the cases covered by articles 18 and 19 any action for damages, however founded, can only be brought subject to the conditions and limits set out in the convention.

(2) In the cases covered by article 17, the provision of the preceding paragraph shall also apply, without prejudice to the questions as to who are the persons who have the right to bring suit and what are their respective rights.

Article 25

(1) The carrier shall not be entitled to avail himself of the provisions of this convention which exclude or limit his liability, if the damage is caused by his wilful misconduct or by such default on his part as, in accordance with the law of the court to which the case is submitted, is considered to be equivalent to wilful misconduct.

(2) Similarly the carrier shall not be entitled to avail himself of the said provisions, if the damage is caused

under the same circumstances by any agent of the carrier acting within the scope of his employment.

Article 26

(1) Receipt by the person entitled to the delivery of baggage or goods without complaint shall be *prima facie* evidence that the same have been delivered in good condition and in accordance with the document of transportation.

(2) In case of damage, the person entitled to delivery must complain to the carrier forthwith after the discovery of the damage, and at the latest, within 3 days from the date of receipt in the case of baggage and 7 days from the date of receipt in the case of goods. In case of delay the complaint must be made at the latest within 14 days from the date on which the baggage or goods have been placed at his disposal.

(3) Every complaint must be made in writing upon the document of transportation or by separate notice in writing dispatched within the times aforesaid.

(4) Failing complaint within the times aforesaid, no action shall lie against the carrier, save in the case of fraud on his part.

Article 27

In the case of the death of the person liable, an action for damages lies in accordance with the terms of this convention against those legally representing his estate.

Article 28

(1) An action for damages must be brought, at the option of the plaintiff, in the territory of one of the High Contracting Parties, either before the court of the domicile of the carrier or of his principal place of business, or where he has a place of business through which the contract has been made, or before the court at the place of destination.

(2) Questions of procedure shall be governed by the law of the court to which the case is submitted.

Article 29

(1) The right to damages shall be extinguished if an action is not brought within 2 years, reckoned from the date of arrival at the destination, or from the date on which the aircraft ought to have arrived, or from the date on which the transportation stopped.

(2) The method of calculating the period of limitation shall be determined by the law of the court to which the case is submitted.

Article 30

(1) In the case of transportation to be performed by various successive carriers and falling within the definition set out in the third paragraph of article 1, each carrier who accepts passengers, baggage or goods shall be subject to the rules set out in this convention, and shall be deemed to be one of the contracting parties to the contract of transportation insofar as the contract deals with that part of the transportation which is performed under his supervision.

(2) In the case of transportation of this nature, the passenger or his representative can take action only against the carrier who performed the transportation during which the accident or the delay occurred, save in the case where, by express agreement, the first carrier has assumed liability for the whole journey.

(3) As regards baggage or goods, the passenger or consignor shall have a right of action against the first carrier, and the passenger or consignee who is entitled to delivery shall have a right of action against the last carrier, and further, each may take action against the carrier who performed the transportation during which the destruction, loss, damage, or delay took place. These carriers shall be jointly and severally liable to the passenger or to the consignor or consignee.

CHAPTER IV. PROVISIONS RELATING TO COMBINED TRANSPORTATION

Article 31

(1) In the case of combined transportation performed partly by air and partly by any other mode of transportation, the provisions of this convention shall apply only to the transportation by air, provided that the transportation by air falls within the terms of article 1.

(2) Nothing in this convention shall prevent the parties in the case of combined transportation from inserting in the document of air transportation conditions relating to other modes of transportation, provided that the provisions of this convention are observed as regards the transportation by air.

CHAPTER V. GENERAL AND FINAL PROVISIONS

Article 32

Any clause contained in the contract and all special agreements entered into before the damage occurred by which the parties purport to infringe the rules laid down by this convention, whether by deciding the law to be applied, or by altering the rules as to jurisdiction, shall be null and void. Nevertheless for the transportation of goods arbitration clauses shall be allowed, subject to this convention, if the arbitration is to take place within one of the jurisdictions referred to in the first paragraph of article 28.

Article 33

Nothing contained in this convention shall prevent the carrier either from refusing to enter into any contract of transportation or from making regulations which do not conflict with the provisions of this convention.

Article 34

This convention shall not apply to international transportation by air performed by way of experimental trial by air navigation enterprises with the view to the establishment of regular lines of air navigation, nor shall it apply to transportation performed in extraordinary circumstances outside the normal scope of an air carrier's business.

Article 35

The expression "days" when used in this convention means current days, not working days.

Article 36

This convention is drawn up in French in a single copy which shall remain deposited in the archives of the Ministry for Foreign Affairs of Poland and of which one duly certified copy shall be sent by the Polish Government to the Government of each of the High Contracting Parties.

Article 37

(1) This convention shall be ratified. The instruments of ratification shall be deposited in the archives of the Ministry for Foreign Affairs of Poland, which shall give notice of the deposit to the Government of each of the High Contracting Parties.

(2) As soon as this convention shall have been ratified by five of the High Contracting Parties it shall come into force as between them on the ninetieth day after the deposit of the fifth ratification. Thereafter it shall come into force between the High Contracting Parties which shall have ratified and the High Contracting Party which deposits its instrument of ratification on the ninetieth day after the deposit.

(3) It shall be the duty of the Government of the Republic of Poland to notify the Government of each of the

High Contracting Parties of the date on which this convention comes into force as well as the date of the deposit of each ratification.

Article 38

(1) This convention shall, after it has come into force, remain open for adherence by any state.

(2) The adherence shall be effected by a notification addressed to the Government of the Republic of Poland, which shall inform the Government of each of the High Contracting Parties thereof.

(3) The adherence shall take effect as from the ninetieth day after the notification made to the Government of the Republic of Poland.

Article 39

(1) Any one of the High Contracting Parties may denounce this convention by a notification addressed to the Government of the Republic of Poland, which shall at once inform the Government of each of the High Contracting Parties.

(2) Denunciation shall take effect six months after the notification of denunciation, and shall operate only as regards the party which shall have proceeded to denunciation.

Article 40

(1) Any High Contracting Party, may at the time of signature or of deposit of ratification or of adherence, declare that the acceptance which it gives to this convention does not apply to all or any of its colonies, protectorates, territories under mandate, or any other territory subject to its sovereignty or its authority, or any other territory under its suzerainty.

(2) Accordingly any High Contracting Party may subsequently adhere separately in the name of all or any of its colonies, protectorates, territories under mandate, or

any other territory subject to its sovereignty or to its authority or any other territory under its suzerainty which have been thus excluded by its original declaration.

(3) Any High Contracting Party may denounce this convention, in accordance with its provisions, separately or for all or any of its colonies, protectorates, territories under mandate, or any other territory subject to its sovereignty or to its authority, or any other territory under its suzerainty.

Article 41

Any High Contracting Party shall be entitled not earlier than two years after the coming into force of this convention to call for the assembling of a new international conference in order to consider any improvements which may be made in this convention. To this end it will communicate with the Government of the French Republic which will take the necessary measures to make preparations for such conference.

• • • •

NATIONS ADHERING TO WARSAW CONVENTION

as listed in *Treaties in Force, A List of Treaties and Other International Agreements of the United States in Force on January 1, 1982*, at 207 (U.S. Dept. of State)

Afghanistan	Gabon
Algeria	Gambia, The
Antigua & Barbuda	German Dem. Rep.
Argentina	Germany, Fed. Rep.
Australia	Ghana
Austria	Greece
Bahamas, The	Grenada
Bangladesh	Guinea
Barbados	Guyana
Belgium	Hungary
Benin	Iceland
Botswana	India
Brazil	Indonesia
Bulgaria	Iran
Burma	Iraq
Cameroon	Ireland
Canada	Israel
Chile	Italy
China	Ivory Coast
Colombia	Jamaica
Congo	Japan
Cuba	Kenya
Cyprus	Kiribati
Czechoslovakia	Korea, Dem. People's Rep.
Denmark, not including Greenland	Kuwait
Dominican Rep.	Laos
Ecuador	Latvia
Egypt	Lebanon
Ethiopia	Lesotho
Fiji	Liberia
Finland	Libya
France, including French colonies	Liechtenstein
	Luxembourg
	Madagascar

Malawi	Solomon Is.
Malaysia	South Africa
Mali	Spain
Malta	Sri Lanka
Mauritania	Sudan
Mauritius	Suriname
Mexico	Swaziland
Mongolia	Sweden
Morocco	Switzerland
Nauru	Syrian Arab Rep.
Nepal	Tanzania
Netherlands	Tonga
New Zealand	Trinidad & Tobago
Niger	Tunisia
Nigeria	Turkey
Norway	Tuvalu
Oman	Uganda
Pakistan	Union of Soviet Socialist Reps.
Papua New Guinea	United Kingdom
Paraguay	United States
Philippines	Upper Volta
Poland	Uruguay
Portugal	Venezuela
Romania	Viet-Nam, Rep.
Rwanda	Western Samoa
St. Lucia	Yemen (Aden)
Saudi Arabia	Yugoslavia
Senegal	Zaire
Seychelles	Zambia
Sierra Leone	Zimbabwe
Singapore	

APPENDIX E
CONSTITUTION OF THE UNITED STATES

. . . .

ARTICLE II

SECTION 2. ¹ The President * * * .

. . . .

² He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two-thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law; but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

. . . .

ARTICLE III

. . . .

SECTION 2. ¹ The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

. . . .

ARTICLE VI

* * * *

² This Constitution, and the Laws of the United States which shall be made in Pursuance thereof, and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land, and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

* * * *

APPENDIX F

Order 74-1-16

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
WASHINGTON, D.C.

Adopted by the Civil Aeronautics Board
at its office in Washington, D.C.
on the 3rd day of January, 1974

Docket 26274

IN THE MATTER OF WARSAW CONVENTION LIABILITY
LIMITATIONS AS EXPRESSED IN U.S. DOLLARS

ORDER

Section 221.38(j) of the Board's Regulations requires U.S. and foreign air carriers which avail themselves of the limits of liability to passengers provided in the Warsaw Convention (49 Stat. 3000; T.S. 876) to include in their tariffs, *inter alia*, a statement as to the amount of the liability limits of the Convention stated in dollars. These provisions of the tariffs, as well as those setting forth limitations of liability under the Convention with respect to baggage and property, restate the applicable law and serve to advise the public of the Convention limitations on their right of recovery for death, or injury or loss or damage to baggage and property.

The liability limits in the Warsaw Convention are set forth in terms of gold francs so that as long as the value of the dollar in terms of gold remained constant, no change was required in the dollar amount of the liability limits contained in the tariffs. However, by Order 72-6-7 adopted

June 2, 1972, the Board directed the carriers to revise their tariffs to reflect the devaluation of the dollar in terms of gold from \$36 per ounce to approximately \$38 which took place effective May 8, 1972, and such revisions have been made. On September 21, 1973, Public Law 93-110 was enacted further devaluating the U.S. dollar to approximately \$42.22 per ounce of gold effective October 18, 1972. As a result, the minimum liability limits specified in Order 72-6-7 and the tariffs currently on file with the Board no longer meet the minimum liability limits of the Convention and a revision of the tariffs is necessary to accurately reflect such limits in dollars.¹

In view of the foregoing and all other relevant matters, the Board finds and concludes:

1. That the dollar limitations stated in the presently effective tariffs of the respondent air carriers and foreign air carriers no longer meet the minimum liability requirements of the Warsaw Convention for "international transportation" or of the Hague Protocol² and "international carriage" as defined therein.

2. That, in this circumstance, such tariff limitations are inconsistent with the applicable law as set forth in the Convention or the Protocol, and the tariff filing requirements in Section 403 of the Federal Aviation Act of

¹ With respect to their liability to passengers, this order will affect only a small proportion of the U.S. and foreign air carriers. Most carriers engaged in international transportation by air involving journeys to or from the United States adhere to the Montreal Agreement (Agreement CAB 18900 approved by Order E-23680 dated May 13, 1966, 31 FR 7302) pursuant to which they have filed tariffs providing for a \$75,000 limit of liability for death or injury to passengers. Since this limit is stated in terms of U.S. dollars, it is unaffected by the change in the gold value of the dollar.

² The Hague Protocol of 1955 doubles the Warsaw liability limit for passengers, but since the United States has not signed or adhered to the Protocol, its provisions do not normally apply with respect to air transportation.

1958, and Part 221 of the Board's Regulations and they must be canceled.

3. That the minimum acceptable figures in United States dollars for liability limits applicable to "international transportation" and "international carriage" are as follows:

Convention and Protocol Minimum Liability	Actual	Rounded ^a
125,000 francs (per passenger, Convention only)	\$10,002.90	\$10,000.00
250,000 francs (per passenger, Hague Protocol only)	20,005.80	20,000.00
5,000 francs (per passenger for unchecked baggage)	400.116	400.00
250 francs (per kilogram for checked baggage and goods)	20.00580	20.00
250 francs (per kilogram on a per-pound basis)	9.07460	9.07

Accordingly, pursuant to the provisions of the Federal Aviation Act of 1958, particularly Sections 204(a), 403, and 1002 thereof,

IT IS ORDERED THAT:

1. The carriers named in Appendix A, attached hereto, shall revise all liability limitations which may be applicable to "international transportation" or "international carriage" as defined in the Convention or the Protocol which are inconsistent with the dollar amounts set forth herein so as to conform with such amounts.

^a Article 22 of the Warsaw Convention permits the liability limits specified therein in gold francs to be converted into any national currency in round figures. The Board is permitting the round dollar amounts set forth in this order to be filed in the tariffs for purpose of convenience. This order is not intended to prohibit carriers from specifying the actual dollar equivalents in their tariffs as some of them do at the present time. The dollar values herein are calculated in accordance with the criteria detailed in Order 72-6-7.

2. The tariff cancellations directed in ordering paragraph 1 above shall become effective on or before February 6, 1974 on not less than 10 days' notice.

3. That copies of this order shall be served on the air carriers and foreign air carriers named in Appendix A.

This order will be published in the Federal Register.

By the Civil Aeronautics Board:

EDWIN Z. HOLLAND
Secretary

[SEAL]

APPENDIX G

Civil Aeronautics Board Order 78-8-10 (excerpts)

DOCKETS 25280, 27573, AGREEMENTS CAB 2698, R-41; 2699, R-49; 2700, R-43; 3119; 7648, R-107; 24475, R-4, R-5; 25186, R-12; 25954, R-1, R-2, R-3; 26701, R-9, IATA, CARGO CARRIAGE CONDITIONS—order 78-8-10 adopted August 3, 1978.

On June 21, 1974, the International Air Transport Association submitted, pursuant to section 412 of the Act, resolution 600b (agreement CAB 24475, R-4) restating the conditions of carriage of cargo to appear on the back of cargo airwaybills and resolution 600j (agreement CAB 24475, R-5) restating the condition to appear on the face of the airwaybills. Thereafter, the Board issued order 75-11-106 on November 26, 1975, inviting all interested persons to submit comments on these agreements and to show cause why the proceeding in agreement CAB 7648, order E-8543 (printed with order E-11024), *Pan Am. World Airways et al., Conditions of Carriage*, 24 C.A.B. 575, 580-591 (1957), should not be terminated and why the Board's earlier approval of agreements CAB 2698 et al., order E-3230, *IATA Traffic Conference Resolutions*, 10 C.A.B. 783 (1949), should not be withdrawn.

The last previous Board approval of IATA conditions of carriage for cargo occurred on September 1, 1949, *IATA Traffic Conference Resolutions, supra*. Though the Board approved the resolution then before it on the ground that the "establishment of these uniform conditions should minimize confusion and misunderstanding," the Board took pains to note that "serious questions relating to the public interest could arise," and placed its interpretation on several of the provisions. The Board concluded with the following admonition (*id.* at 793-794):

We extend our approval for a temporary period in order to permit the immediate use of the uniform

arrangements discussed herein pending revision of the provision under consideration in a manner consistent with the views expressed herein. Should the carriers fail to make such revision at their first opportunity, the public interest may require us to withdraw the approval herein granted.

In 1954 the IATA carriers filed a revision to the earlier approved resolution (agreement CAB 7648, R-107, adopted by the IATA traffic conferences in Honolulu in November 1953). In considering the Honolulu revisions in order E-8543,¹ the Board stated:

The Board is seriously concerned with the little progress that appears to have been made to revise the basic provisions of these agreements to meet the points raised in the aforesaid opinion. While still recognizing the importance of uniformity in the tickets, waybills, and conditions of carriage, it is of the opinion that such uniformity should not be obtained at the sacrifice of the rights of passengers and shippers, and that further approval of provisions which are otherwise adverse to the public interest is not warranted.

The Board, accordingly, tentatively approved some of the provisions, some conditionally, and tentatively disapproved others, giving parties 30 days within which to file objections. Objections were filed by the IATA carriers, in which they requested the opportunity for conferences with the staff of the Board for purposes of facilitating disposition of the issues. The Board authorized such informal discussions by order E-8842, dated December 22, 1954, but no final resolution of the cargo issues ever materialized.² The result is that the tentative order of August 5, 1954, with respect to cargo, never became final,

¹ *Pan Am. World Airways et al., Conditions of Carriage, supra* at 581.

² The informal conferences resulted in a revised resolution respecting passenger service which was approved by order E-11024.

and the only order of approval of IATA conditions on cargo now in effect is that of September 1, 1949 (*IATA Traffic Conference Resolutions, supra*).

Comments³ in response to order 75-11-106 have been filed by IATA, Seaboard, the Board's Office of Consumer Advocate (OCA), and (jointly) the National Retail Merchants Association, the Shippers National Freight Claim Council, Inc., and the National Small Shipments Traffic Conference (Shippers). In addition, IATA submitted agreement CAB 25954, R-1, R-2, and R-3, docket 27573, revising or canceling some of the provisions in the 1974 agreements, which meet some of the objections listed in appendix C to order 75-11-106. Attached are appendixes A and B containing resolutions 600b and 600j, as filed and as amended. Neither IATA nor the carrier parties address the part of order 75-11-106 dealing with the rescission of the Board's approval of the earlier IATA agreement in *IATA Traffic Conference Resolutions, supra*, or the termination of the proceeding in *Pan Am. World Airways et al., Conditions of Carriage, supra*.

Order 75-11-106 also deferred decision on the provisions of the agreement that presented issues similar to those under review by the Board in the Liability and Claim Rules and Practices Investigation, docket 19923. By order 76-3-139, March 22, 1976, and order 77-3-61, *Liability and Claim Rules and Practices*, 73 C.A.B. 116 (1977), the Board resolved these issues, and we are now able to dispose of the matters before us. Petitions to review certain aspects of orders 76-3-139 and 77-3-61 were filed by American Airlines et al. in the U.S. Court of Appeals for the District of Columbia Circuit. Thereafter Congress passed and the President signed Public Law 95-163, removing Board jurisdiction over the reasonableness of domestic cargo rates and rules. When the

³ App. C to order 75-11-106 contains an analysis and the Board's tentative findings as to each provision of the IATA agreements in issue so that comments could be directed to the specific problems enumerated.

enactment of Public Law 95-163 was called to the attention of the court, the court vacated and remanded the proceedings to the Board.

Inasmuch as the resolutions and agreements before us concern international traffic, we believe that neither the court's remand nor Public Law 95-163 prevents us from giving such weight as we think necessary to the findings and conclusions of the Liability Rules case.

We turn now to section-by-section consideration of the conditions of carriage.

RESOLUTION 600b

Article (1).—Article (1) is the preamble to the conditions of carriage and states that the Warsaw Convention,⁴ if applicable, limits the liability of the carriers for loss or damage to the cargo. Though this preamble on the back of the waybill does not specifically refer to the carrier's liability for *delay*, the front of the waybill contains a statement that Warsaw limits the carrier's liability for loss, damage, or *delay* of cargo. Moreover, article 19 of Warsaw specifically provides that the carrier shall be liable for damages occasioned by delay in the transportation of cargo.⁵ In these circumstances, we consider the omission of the word "delay" in the preamble to be an oversight, which the carriers shall correct.

Article (1)1.—This subparagraph defines carrier as all air carriers which carry or undertake to carry cargo under the airwaybill or perform any other services incidental to such air carriage. The Warsaw Convention is defined as the convention signed at Warsaw on Octo-

⁴ Unification of Certain Rules Relating to International Transportation by Air, signed at Warsaw Oct. 12, 1929 (49 Stat. 3000), referred to as "Warsaw Convention" or simply "Warsaw."

⁵ Art. 23 of Warsaw further provides that any provision tending to relieve a carrier of its liability under Warsaw shall be null and void.

ber 12, 1929, or the Convention as amended at The Hague, September 28, 1955.⁶ The definition of French gold francs is the same as the definition in the Warsaw Convention—consisting of 65½ milligrams of gold with a standard fineness of nine hundred-thousandths. These are standard definitions, and no objections have been filed against them. This subparagraph will be approved.

Article (1)2(a).—This subparagraph states that the Warsaw Convention is applicable unless the carriage is not “international transportation” as defined in the Warsaw Convention. The Board’s decision in docket 19923 retained the distinction between Warsaw and non-Warsaw traffic,⁷ so the Board will approve this provision.

Article (1)2(b).—This subparagraph states that the carriage of cargo is subject to applicable laws, regulations, and tariffs which are made a part of the contract of carriage. This provision is approved subject to the condition that it is not to be construed as Board approval, either express or implied, of the provisions of any of the filed tariffs.

Article (1)3.—This subparagraph provides for the abbreviation of a carrier’s name on the waybill. It also provides that carriage to be performed by several successive carriers shall be regarded as a single operation. Inasmuch as most carriers’ abbreviations are generally understood and no party objected to this provision, we shall approve this subparagraph.

Article (1)4.—This subparagraph states that except as otherwise provided in a carrier’s tariffs or conditions of carriage, the carrier’s liability for non-Warsaw cargo

⁶ Referred to as the “Hague Protocol” in this order.

⁷ Under Warsaw, international transportation not only must take place between two countries, but the two countries must also be signatories to the Convention. There are several countries which have not adopted the Convention, giving rise to the distinction between so-called Warsaw and non-Warsaw traffic.

shall not exceed \$20 per kilogram of the goods lost, damaged, or delayed, unless a higher value is declared and additional charges paid. At the present time a carrier's liability for Warsaw traffic, in the absence of a declaration of higher value, is \$20 per kilogram, so that this subparagraph provides the same monetary limit for non-Warsaw traffic, unless the carrier's tariff provides otherwise. * * *

* * *

APPENDIX A

Resolution 600b Air Waybill—Conditions of Contract (1974 agreement CAB 24475, R-4) (as amended by 1976 agreement CAB 25954-R1, and 1977 agreement CAB 26701-R9) (new)

106 (CTPC) 600b, 206 (CTPC) 600b, 306 (CTPC) 600b
Expiry, indefinite; type, B

RESOLVED THAT:

- (1) The conditions of contract, prefaced by a notice, on the reverse side of the air waybill/consignment note, read as follows:

NOTICE CONCERNING CARRIERS LIMITATION OF LIABILITY

If the carriage involves an ultimate destination or stop in a country other than the country of departure, the Warsaw Convention may be applicable and the convention governs and in most cases limits the liability of the carrier in respect of loss of or damage to cargo to 250 French gold francs per kilogramme, unless a higher value is declared in advance by the shipper and a supplementary charge paid if required. The liability limit of 250 French gold francs per kilogramme is approximately U.S. \$20 per kilogramme on the basis of U.S. \$42.22 per ounce of gold.

* * *

APPENDIX H

FOR INFORMATION

CIVIL AERONAUTICS BOARD

May 20, 1981

MEMORANDUM

TO: The Board

FROM: Director, Bureau of Compliance and Consumer Protection

CC: Director, Bureau of International Aviation
Director, Bureau of Domestic Aviation
General Counsel

SUBJECT: Warsaw Convention Liability Limits

For more than a year now, various components of the Board's staff have been considering the question of how the liability limitations contained in the Warsaw Convention should be converted to dollars. The question is a troublesome one, and the memoranda exchanged among the staff have not reached the same conclusions of this issue.¹ There is considerable interest in the final resolution of this matter among parties outside the Board, including some involved in litigation where the amount of potential liability is a significant issue.

The Board has never taken a position as to which liability limitation level is correct, and the Bureau of Compliance and Consumer Protection recommends that the Board decline to take any position which would affect the determination of liability limits until the matter has been further defined at the staff level. Any policy recommendation that would come from the staff should be communicated to the Departments of Transportation and State as

¹ This Bureau wrote the first memorandum in March, 1980. BIA and BDA wrote reply memos in April, 1980.

well in the hope of reaching interagency agreement. This memorandum contains BCCP's reappraisal of the problem and is intended to initiate a fresh start in addressing the question at the Board.

I. Background

The Warsaw Convention was signed at Warsaw, Poland, on October 12, 1929, and ratified by the United States Senate on July 31, 1934.^{1a} Among its most compelling purposes were the protection of the fledgling aviation industry from potentially ruinous damage judgments and the assurance of some reliable and consistent basis for recovery for injury or damage to persons or property.² Thus the Convention (a) enunciated carriers' liability for personal injuries (Article 17), damage or loss of baggage and other property (Article 18), and damage due to delay (Article 19) subject to affirmative defenses which could be proved by a carrier, *i.e.*, the carrier's freedom from fault (Article 20) or the injured person's contributory fault (Article 21); (b) provided a limitation on the extent of liability (Article 22); and (c) nullified any provision tending to relieve a carrier of any such liability or to fix a lower limit (Article 23). In addition, the Convention required carriers to provide notice to the passengers in the form of a ticket or baggage check with respect to, *inter alia*, the limitations on liability, and barred defenses permitted by the Convention, including the limitation of liability, if carriers accept passengers or baggage without delivering the required ticket or baggage check (Articles 3 and 4).

The Board has implemented Articles 3 and 4 by specifying the notice carriers must provide concerning the lia-

^{1a} 49 Stat. 3000.

² Lowenfeld and Mendelsohn, *The United States and the Warsaw Convention*, 80 Harv.L.Rev. 497, 498-500 (1967). See also Horner & Legrez, *Minutes, Second International Conference on Private Aeronautical Law, Warsaw 1929* (Fred B. Rothman & Co. 1975), pp. 38, 40-41.

bility limits. 14 C.F.R. Sections 221.175 and 221.176. Carriers also include the liability limits in tariffs filed with the Board, as required by Section 403(a) of the Act and Part 221.3 of the Board's Regulations. The Board has also been an active participant in Congressional hearings concerning possible amendments to the Convention.

In March, 1980, our former Policy Development Division sent the Board a memo suggesting that carriers are violating the Warsaw Convention by asserting liability limits much lower than those actually permitted by the Convention. These limitations are expressed in terms of gold and have always been converted to dollars by use of the official rate of gold. Since there no longer is an "official" price for gold in the U.S., the memorandum suggested that the market value of gold has to be used in converting the liability limits to dollars.

BIA and BDA have written memos responding to this suggestion. Each response posed two major objections, i.e., (1) that the recommendation is inconsistent with the intention of the Warsaw signatories and (2) that it is inconsistent with IMF amendments establishing "Special Drawing Rights" tied to a basket of 16 currencies, rather than gold, as the basic unit of account for converting currencies. The Board has not taken any action on the recommendation.

II. *Discussion*

In 1929, when the Warsaw Convention was adopted, currencies were either expressed in gold or easily convertible to gold using an official rate. From 1933 to 1974, gold ownership in the United States was legal only for a small class of uses, such as jewelry-making and dentistry. The price of gold in these transactions was dictated by the government's official price, since it was the government's policy to buy and sell gold at that rate. A private buyer would thus not pay more than the official rate because he could buy it from the government at that price and,

conversely, a private seller would not accept less than the official rate because he could sell it to the government for that amount.

The drafters of the Warsaw Convention thus foresaw no ambiguity in their use of gold as the unit of account because at the time governments had an official rate of gold which was easily discernible and virtually identical to the market rate of gold, to the extent that a market rate existed at all. Seeing no ambiguity, they never addressed the question of whether the official or market rate should be used in converting the limits to national currencies. To determine how the limits should be converted now that there is no official rate, one must attempt to determine what is most consistent with the purpose of the limitation on liability.

The primary purpose of the liability limits in the Warsaw Convention is the protection of carriers from unforeseeable and unlimited liability. At the time of the Convention, it was feared that carriers would refuse to carry passengers and or cargo unless they could measure the scope of risk they were assuming. The limits were thus intended to provide a measure of predictability for carriers so that they could operate free from the fear of unlimited liability.

The use of gold as the unit of account was intended "to avoid, as far as the limits are concerned, the effects of devaluations which would result from having the limits expressed in any local currency."³ The use of gold was

³ H. Drion, *Limitations of Liabilities in International Air Law* 1954, p. 183. Other writers agree but add that the use of gold was also intended to assure that damages awarded by different countries would have a uniform value and to provide stability in terms of the purchasing power represented by the limits. Bristow, "Gold Franc—Replacement of Unit of Account," LMCLQ 31 (1978), Asser, "Golden Limitations of Liability in International Transport Conventions and the Currency Crisis," 5 J. Maritime L. and Com. 645 (1973-74), Norway, "Conversion from Poincare Franc to National

thus seen as providing more stability than any national currency could, further promoting the predictability the limits were intended to provide. This was because national currencies were subject to devaluation by their country, whereas the value of gold was not subject to change as the result of a single country's unilateral action.

There can be no doubt that use of the official rate of gold produces results more consistent with these purposes than use of the market rate. The official rate of gold, at least in the United States, fluctuated only rarely. Even in countries whose currencies were devalued more frequently, the official rate would provide greater predictability and stability than the market rate. This is especially true now, since speculation has led to wildly fluctuating market prices of gold.

Use of an official rate is supported by the approach adopted in more recent Conventions, when the ambiguity of expressing limits in terms of gold was more apparent. Both the Convention Concerning Liability for Oil Pollution, signed in Brussels in 1969, and the Convention Relating to the Limitation of the Liability of the Owners of Inland Navigation Vessels, signed in Geneva in 1973, expressly provided for the use of the official value of gold in setting liability limits.⁴ Conversion by the official rate is further bolstered by the fact that a majority of courts have used it in converting Warsaw's limits after the official and market rates began to diverge.⁵ ICAO also passed a resolution in 1974 opposing the use of the market price of gold in converting Warsaw's limits, which pro-

Currency," Presented to the 1974 meeting of ICAO's Legal Committee, and Tobolewski, "The Special Drawing Right in Liability Conventions: an Acceptable Solution?" 2 LMCLQ 169, 171 (1979).

⁴ The Legal Committee of ICAO, *Resolution Concerning the Conversion of Poincare Francs to National Currencies in the Warsaw and Rome Conventions*, 1974.

⁵ Tobolewski, "The Special Drawing Right in Liability Conventions: An Acceptable Solution?" 2 LMCLQ 169, 171 (1979).

vides a strong indication of how other participating countries feel.⁶

Since it appears that stable limits were of paramount importance to the drafters of the Convention, basing them on the market value of gold would be inconsistent with the Convention. Since there is no longer an official rate of gold in the United States, however, it is not entirely clear how the limits should be converted.

In 1975, the Warsaw signatories attempted to deal with the changes in the role of gold in international monetary transactions. Their answer, embodied in the Montreal Protocol, was the substitution of Special Drawing Rights (SDR's) for gold as the basis for conversion. The SDR is a creation of the International Monetary Fund (IMF), the agency which establishes the basic ground rules for currency transactions between member countries. Use of SDR's by the Montreal signatories was presumably intended to eliminate the confusion over how the Warsaw limits should be converted from gold to national currencies. With no official rate of gold and a fluctuating market rate which would produce results at odds with the Convention's purposes, the Montreal signatories chose to abandon gold in favor of SDR's because SDR's provided the stability and ease of conversion which had attracted the Warsaw signatories to choose gold as the unit of account.

The United States supported the SDR approach at Montreal and signed the Montreal Protocol.⁷ If the Senate had ratified the Protocol, the SDR approach would be law and there would be no problem in determining Warsaw's limits. The Senate has not ratified the Protocol, however, although it was submitted for ratification in January, 1977. Its failure to either ratify or reject the Protocol

⁶ See footnote 4.

⁷ Fitzgerald, "The Four Montreal Protocols to Amend the Warsaw Convention Regime Governing International Carriage by Air," 42 J. Air L. & Comm. 273, 325, 329-30 (1976).

makes determination of the proper conversion rate difficult because (1) as explained above, use of the market rate of gold produces results inconsistent with the Convention's purposes, (2) there is no current official rate of gold and (3) the United States is obligated by international law to refrain from acts which would defeat the object and purpose of the Montreal Protocol.⁸

To fulfill its obligation to observe, to the extent possible, the requirements of both the Warsaw Convention and Montreal Protocol, the Board has for the past five years been engaging in a legal fiction. Unable to use the SDR approach because Montreal has not been ratified and constrained from using the market price of gold because doing so would defeat the object and purpose of both Montreal and Warsaw, the Board has continued to convert Warsaw's limits based on the official rate of gold immediately preceding the elimination of all ties between gold and the dollar.⁹ This approach produces the greatest degree of stability possible since the dollar limits will remain constant unless and until the United States reestablishes ties between gold and the dollar.

We believe that the Board's current course of action is superior to any of the alternatives currently available. Use of the last official rate of gold, however may at times prevent passengers from recovering the full extent of damages caused by carriers.¹⁰ Carriers may no longer need

⁸ Article 18, Vienna Convention on the Law of Treaties, requires a country to refrain from acts which would defeat the purpose and object of a treaty it has signed until it makes clear its intention not to become a party. This obligation applies even when the treaty was signed subject to ratification and has not yet been ratified.

⁹ Thus, the notice of Warsaw's limits required by Parts 221.175 and 221.176 of the Board's Regulations is based on conversion at this rate.

¹⁰ The limits are \$9.07 per pound for checked luggage, \$400 for carry-on-bags and approximately \$10,000 per passenger. The \$10,000 limit is superseded, however, by a \$75,000 limit adopted by carriers in 1966.

the protection of these low limits, given the maturation of the aviation industry since 1929.

Because of the confusion inherent in converting Warsaw's limits when there is no official rate of gold and the equitable considerations raised by the low limits currently in force, we believe the Board should develop a coherent policy resolution of the questions, and then meet with the Departments of Transportation and State to review this problem. These agencies will be solely responsible for enforcing Warsaw in the future and have participated actively in formulating U.S. policy in this area in the past. Pending resolution of this issue by the three agencies we believe the Board should take no action which would disturb the conversion formula now contained in sections 221.175 and 221.176 of the regulations.

/s/ John Golden
JOHN GOLDEN

Prepared by:
Steven Rothenberg
Ext. 3-5943

APPENDIX I

*Membership List of International Air Transport
Association (IATA)*

(As of January 15, 1983)

Members who join IATA as potential intervenors herein are designated by an asterisk.

ACTIVE Members

- *Aer Lingus Teoranta
- *Aerolineas Argentinas
- *Aeronaves de Mexico S.A. (AEROMEXICO)
- Aerovias Nacionales de Colombia S.A.
(AVIANCA)
- Air Afrique
- Air Algérie
- Air Botswana Pty. Ltd.
- Air Burundi
- *Air Canada
- *Air France
- Air Gabon
- Air Guinée
- *Air-India
- *Air Malawi Limited
- Air Mali
- Air Malta
- *Air Mauritius
- *Air New Zealand
- Air Niugini
- Air Pacific
- Air Tanzania Corporation
- Air Tungaru Corporation
- Air UK
- Air Vanuatu Limited
- Air Zaire
- Air Zimbabwe
- *ALIA—The Royal Jordanian Airline (a wholly owned subsidiary of Arab Wings)

- ALITALIA—Linee Aeree Italiano
American Airlines Inc.
Ariana Afghan Airlines Co. Ltd.
Austrian Airlines
Braniff International Inc.
- British Airways
- British Caledonian Airways Ltd.
Cameroon Airlines
Caribbean Air Cargo Company Ltd.
- Ceskoslovenske Aerolinie (CSA)
Compania Mexicana de Aviacion S.A. de C.V.
- CP Air
- Cruzeiro do Sul S.A.—Servicos Aéreos
Cyprus Airways Limited
- Deutsche Lufthansa A.C.
- Eastern Air Lines Inc.
- Egyptair
- El Al Israel Airlines Limited
Empresa Consolidada Cubana de Aviación
(CUBANA)
- Empreso Ecuatoriana de Aviacion
(ECUATORIANA)
- Ethiopian Airlines
Finnair OY
Flying Tiger Inc. (a wholly owned subsidiary
of Tiger International)
- P.T. Garuda Indonesian Airways
Ghana Airways Corporation
Gulf Air Company G.S.C.
- IBERIA, Líneas Aéreas de España S.A.
Icelandair
Indian Airlines
- Iran Air, The Airline of the Islamic Republic
of Iran
- Iraqi Airways

- Jamahiriya Libyan Arab Airlines
- *Japan Air Lines Co. Limited
- Jugoslovenski Aerotransport (JAT)
- Kenya Airways Ltd.
- *KLM Royal Dutch Airlines
- *Kuwait Airways Corporation
- LAM—Linhas Aéreas de Mocambique
- Línea Aérea del Cobre Ltda. (LADECO)
- Línea Aérea Nacional de Chile (LAN-CHILE)
- Línea Aéreas Constarricenses S.A. (LACSA)
- Lloyd Aéreo Boliviano S.A. (LAB)
- *Middle East Airlines Airliban
- Nigeria Airways Limited
- *Olympic Airways S.A.
- Pakistan International Airlines Corp.
- *Pan American World Airways, Inc.
- *Philippine Airlines Inc.
- Polskie Linie Lotnicze (LOT)
- *Polynesian Airlines (Operations) Ltd.
- Primeras Lineas Uruguayas de Navegacion
Aérea (PLUNA)
- *Qantas Airways Limited
- Royal Air Maroc
- Royal Swazi National Airways
Corporation Ltd.
- *SABENA (Société anonyme belge d'exploitation
de la navigation aérienne)
- *Saudi Arabian Airlines Corp.
- *Scandinavian Airlines System (SAS)
- Sierra Leone Airlines Limited
- Solomon Islands Airways Limited (SOLAIR)
- Somali Airlines
- *South African Airways
- Sudan Airways

- *Swiss Air Transport Co. Limited (SWISSAIR)
- Syrian Arab Airlines
- TAAG—Linhas Aereas de Angola
(Angola Airlines)
- *TAP—Air Portugal
- Trans-Mediterranean Airways S.A.R.L. (TMA)
- Trans World Airlines Inc. (a wholly owned
subsidiary of Trans World Corp.)
- Trinidad and Tobago (BWIA International)
Airways Corp.
- Tunis Air
- Turk Hava Yollari A.O. (Turkish Airlines)
- *Union de Transports Aériens (UTA)
- United Airlines
- *VARIG S.A. (Viacao Aérea Rio-Crandense)
- Venezolana Internacional de Aviacion S.A.
(VIASA)
- YEMENIA Yemen Airways Corporation
- Zambia Airways Corporation Ltd.

ASSOCIATE Members

- Aerolineas Cordillera Ltda. (AEROCOR)
- Air Liberia
- Ansett Airlines of Australia (a division of
Ansett Transport Industries Ltd.)
- Aviacion y Comercio, S.A. (AVIACO)
- Commercial Airways (Pty.) Ltd.
- Douglas Airways Pty. Limited
- *Eastern Provincial Airways Limited
- East-West Airlines Limited
- IPEC Aviation
- Kendall Airlines (a division of Ansett Trans-
port Industries Ltd.)

Masling Commuter Services Pty. Ltd.
Mount Cook Airlines (a division of the Mount
Cook Group Ltd.)

Namib Air (Pty.) Ltd.

Quebecair

TALAIR Pty. Limited
Trans Australia Airlines
Transbrasil S.A. Linhas Aéreas (Trans Brasil)
Trans-Jamaican Airlines Limited

Viacao Aérea Sao Paulo S.A. (VASP)

No. 82-1186

Office - Supreme Court U.S.
FILED

MAR 15 1983

ALEXANDER E. STEVENS,
CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1982

TRANS WORLD AIRLINES, INC.,
v. *Petitioner,*

FRANKLIN MINT CORPORATION, FRANKLIN MINT LIMITED
and MCGREGOR, SWIRE AIR SERVICES LIMITED,
Respondents,

INTERNATIONAL AIR TRANSPORT ASSOCIATION AND
FORTY-THREE OF ITS MEMBER AIRLINES (SEE APPENDIX I)
Potential Intervenors.

**SUPPLEMENTAL MEMORANDUM
OF POTENTIAL INTERVENORS**

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IN THE
Supreme Court of the United States

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TRANS WORLD AIRLINES, INC.,
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FORTY-THREE OF ITS MEMBER AIRLINES (SEE APPENDIX I)
Potential Intervenors.

**SUPPLEMENTAL MEMORANDUM
OF POTENTIAL INTERVENORS**

Potential intervenors, International Air Transport Association and forty-three of its member airlines, file this Supplemental Memorandum to inform this Court of an event subsequent to the time their petition to intervene and for writ of certiorari was filed.

On March 8, 1983, the United States Senate failed to obtain by a required two-thirds majority, by a vote of 50 yeas, 42 nays in favor of ratification, the Montreal Protocols 3 and 4. After the vote was taken, the Majority Leader moved for reconsideration, and consequently the matter remains on the Senate Calendar. 129 Cong. Rec. S2279 (daily ed. March 8, 1983). As noted in our Petition (pp. 8-9), these Protocols were designed to amend the Warsaw Convention by substituting the SDR as a unit of conversion for Poincare francs in Article 22(4), re-

vising upward passenger liability limits and permitting each nation to supplement the Convention limits with a compensation plan. The United States, through the Executive Branch, participated in the formulation of these Protocols and signed them. They were forwarded to the United States Senate for advice and consent on January 14, 1977. *See* S. Exec. Rep. No. 45, 97th Cong., 1st Sess., at 3-7 (1981).

This disagreement between the political branches of the United States Government emphasizes the inappropriateness of the Second Circuit's judicial intervention into this country's continuing relationship with the other signatories of the Warsaw Convention. The Senate's action does not affect the viability of the Warsaw Convention, nor of any specific provision thereof. Therefore, it remains the law of the land. Any current differences between the Executive and the Senate must be resolved without interference from the Judicial Branch.

This development also emphasizes the interest of the petitioners, and in many cases their governments, in ensuring that the normal Warsaw Convention procedures remain in effect (Petition to Intervene, pp. 11-14).

Respectfully submitted,

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Nos. 82-1186 and 82-1465

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TRANS WORLD AIRLINES, INC., PETITIONER

v.

FRANKLIN MINT CORPORATION, ET AL.

FRANKLIN MINT CORPORATION, ET AL., PETITIONERS

v.

TRANS WORLD AIRLINES, INC.

ON PETITIONS FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

The United States will address the following question:

Whether recent international monetary developments and the repeal in 1978 of the Par Value Modification Act, former 31 U.S.C. 449, render unenforceable in United States courts the limitations on carrier liability, stated in terms of quantities of gold, prescribed by Article 22 of the 1929 Warsaw Convention on international air transportation.

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In the Supreme Court of the United States

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*ON PETITIONS FOR A WRIT OF CERTIORARI TO
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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

INTEREST OF THE UNITED STATES

This case presents a substantial question of recurring importance respecting the enforceability in United States courts of key provisions of the Warsaw Convention on international air transportation.¹ The Warsaw Convention creates a uniform regime to govern the international car-

¹ This treaty, universally known simply as "the Warsaw Convention," is more properly termed the Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, 49 Stat. 3000, T.S. No. 876, 137 L.N.T.S. 11, reprinted in 49 U.S.C. 1502 note. The United States has been a party to the Warsaw Convention since 1934.

riage of passengers, baggage and cargo by air, including rules governing tickets, baggage checks and air waybills, and regulates the liabilities of carriers. Generally speaking, under Articles 18-21 of the Convention, carriers are presumptively liable for the loss of shipped goods. As *quid pro quo* for this rule favoring shippers, the liabilities of carriers are limited. Article 22(2) of the Convention provides in pertinent part:

In the transportation of checked baggage and of goods, the liability of the carrier shall be limited to a sum of 250 francs per kilogram, unless the consignor has made, at the time when the package was handed over to the carrier, a special declaration of the value at delivery and has paid a supplementary sum if the case so requires. * * *

Article 22(4) provides that the currency unit employed in the Convention "shall be deemed to refer to the French franc consisting of 65½ milligrams of gold at the standard of fineness of nine hundred thousandths." This unit is generally known as the Poincare franc.

The court of appeals has declared unenforceable the limitation on liability for loss of, or damage to, goods shipped by air in international commerce subject to the Warsaw Convention. This decision, if allowed to stand, will have significant adverse consequences for the United States both in its immediate application to the Warsaw Convention and in its broader implications for the treaty obligations of this country generally. The United States continues to regard the Warsaw Convention as a binding international agreement. See U.S. Dep't of State, *Treaties in Force* 207-208 (1982). Indeed, if the United States wished to terminate its participation in the system established by the Convention, it would be obligated to give its treaty partners six months' notice. Art. 39(2). The United States remains committed to the Convention as the basic instrument governing questions of liability in the international aviation industry.

The Department of State informs us that several foreign governments have expressed their view that the court of appeals' decision will seriously affect United States rela-

tions in international aviation. Pursuant to the United States' obligations under the Convention itself, and under the generally recognized principle of international law *pacta sunt servanda* ("treaty obligations must be observed"), the United States is required to uphold the Convention's enforceability. Only if there is a clear decision by the political branches of the federal government to abrogate a treaty, by formal executive denunciation or legislative mandate, should the courts take the extraordinary step of placing the United States in violation of its international commitments.

The United States also has a substantial interest in assuring that this Nation's treaty obligations are applied uniformly throughout the federal court system. Because the decision of the court of appeals is at odds with those of other federal courts that have considered the questions presented, and because the issues involved are recurring ones, this interest is adversely affected by the court of appeals' ruling.

STATEMENT

1. Franklin Mint Corp. brought this action in the United States District Court for the Southern District of New York to recover damages from Trans World Airlines, Inc. for the loss of a shipment of 714 pounds of numismatic material that was carried by TWA from New York to London. The freight charge for the shipment was \$544.96. Although Franklin Mint subsequently claimed that the coins were worth \$250,000, it did not make a special declaration of value, as permitted by the Warsaw Convention. The parties stipulated that the action was governed by the Warsaw Convention and that TWA was liable for the loss (Pet. App. A-3 to A-4).²

TWA moved for partial summary judgment, asserting that under Article 22 of the Warsaw Convention its liability should be limited to the equivalent of 250 francs per kilogram of cargo weight and that each franc should be evaluated as "65½ miligrams of gold at the standard of fineness

² "Pet. App." refers to the appendix to the petition for a writ of certiorari in No. 82-1186.

of nine hundred thousandths." The parties agreed to the applicability of this standard and the weight of the shipment. The only dispute concerned the rate at which the liability limitation, stated in Article 22 of the Convention in terms of gold francs, was to be translated into dollars.³ Franklin Mint argued that its recovery should be converted into dollars through use of the free market value of gold. TWA claimed, instead, that damages were to be computed through use of one of three conversion measures: (1) the official price of gold (\$42.22 per troy ounce) that prevailed under the Par Value Modification Act, former 31 U.S.C. 449, prior to its repeal,⁴ (2) a price adjusted by reference to the

³ The parties apparently agreed that the actual value of the shipment exceeded the limitation rate; accordingly, no question of actual value was presented.

⁴ In 1945, the United States and other countries, in accepting membership in the International Monetary Fund, undertook to maintain a "par value" for their currencies, expressed in terms of gold, and to convert foreign official holdings of their currencies into gold or the currency of the holder, at the request of the holder. See Bretton Woods Agreements Act, ch. 339, 59 Stat. 512; Articles of Agreement of the International Monetary Fund, Dec. 27, 1945, 60 Stat. 1401, T.I.A.S. No. 1501. In practice, most countries maintained par values for their currencies by official intervention in the foreign exchange market (i.e., by buying and selling their currencies against dollars, in order to keep currency exchange rates within narrow margins). The United States met its par value obligations by undertaking freely to buy and sell gold in exchange for officially held balances of dollars at the official price of gold—the dollar's par value. Gold was both the unit of account for par values and the main reserve asset of the monetary system.

The Bretton Woods system ultimately proved insufficiently flexible to accommodate major changes in the world economy and, in particular, shifts in the economic position of the United States relative to other major countries. Consequently, in August 1971, the United States suspended convertibility of foreign official holdings of dollars into gold as the initial step in a major realignment of exchange rates and a reform of the international monetary system. Realignment of exchange rates occurred in December 1971 and February 1973. Concomitant changes in the par value of the dollar were approved by Congress. Par Value Modification Act, Pub. L. No. 92-263, Section 2, 86 Stat. 116, as amended by Pub. L. No. 93-110, Section 1, 87 Stat. 382. In 1973, however, after the second major realignment of exchange rates and in response to severe market pressures, many nations moved to "floating" exchange rates. In 1976 the IMF nations agreed in the Jamaica Accords to amend the IMF Articles to relieve the United

value of the Special Drawings Rights (SDRs) established under the auspices of the International Monetary Fund,⁵ or (3) the exchange value of the contemporary French franc. Under either the last official price of gold or the SDR-based methods for conversion, TWA's liability in this case would be limited to roughly \$6500. The use of the contemporary French franc would yield a somewhat larger recovery, while conversion at the free market value would produce a recovery many times greater, but still significantly less than the actual value now claimed for the shipment (Pet. App. A-4 to A-6).

States and other IMF members of the obligation of maintaining par values of their currencies and to adopt the Special Drawing Right (SDR) as the unit of account of the IMF. See note 5, *infra*. Second Amendment of Articles of Agreement of the International Monetary Fund, Apr. 1, 1976, 29 U.S.T. 2203, T.I.A.S. No. 8937. The Second Amendment took effect on April 1, 1978. This amendment was accepted by Congress. Pub. L. No. 94-564, 90 Stat. 2660. By the same legislation, the Par Value Modification Act, which had fixed the par value of the dollar, was repealed. See pages 11-14, *infra*.

⁵ SDRs are international reserve assets allocated by the IMF to member countries to supplement existing reserve assets.

At the time the original Articles of Agreement of the International Monetary Fund became effective in 1945, the dollar, which then had a fixed par value in terms of gold, was the IMF unit of account. See note 4, *supra*. The SDR was created by the IMF nations in 1969. First Amendment of Articles of Agreement of the International Monetary Fund, July 28, 1969, 20 U.S.T. 2775, T.I.A.S. No. 6748. The SDR was originally defined in terms of gold and was equal in value to the dollar.

In July 1974, after the advent of floating exchange rates, the SDR was revalued as the sum of specified amounts of a number of currencies. Under the Second Amendment of the IMF Articles of Agreement, the SDR's value is no longer defined in terms of gold but is determined daily on the basis of the market exchange rate for specified amounts (a mixed "basket") of a number of major national currencies. Although the United States dollar is a major component of the basket, the value of the dollar in terms of the SDR varies over time, depending upon changes in exchange rates for the various currencies in the "basket." Each day, the IMF publishes a valuation for the dollar in terms of SDRs. Under the 1978 Amendment to the IMF Articles of Agreement the SDR became the IMF unit of account.

TWA proposed that its liability in this case be established as the dollar value, on the date of loss, of that number of SDR's which had, on March 31, 1978, a value equivalent to the limitation rate, stated in gold, by the Convention.

The district court stated: "[w]here we writing on a clean slate we would find the arguments in favor of * * * [the SDR] most persuasive" (Pet. App. A-27). It concluded, however, that the calculation of the dollar amount should be made by using the last official price of gold fixed by the Par Value Modification Act. *Ibid.* The court observed that this measure remained the basis for the liability limitations stated in dollars in international air tariffs filed with the Civil Aeronautics Board. In the court's view, this measure "c[a]me[] as close as anything to constituting a governmental interpretation of the Article 22 limitation" (*ibid.*), to which deference was due. Accordingly, Franklin Mint was awarded \$6,475.98, plus interest and costs (*id.* at A-28).

2. The court of appeals affirmed "the result reached in this case" (Pet. App. A-3), adopting the district court's reasoning and citing the reliance interests of the parties as the rationale for that disposition (*id.* at A-19). The court of appeals nonetheless purported to "hold the Convention's limit on liability prospectively unenforceable in United States Courts" (*id.* at A-3). The court believed that "neither international nor domestic sources of law specify a unit of account for purposes of the Convention" (*id.* at A-17). In particular, the court understood the repeal of the Par Value Modification Act to preclude reference, for purposes of enforcing the Convention, to the price of gold set by that Act (*id.* at A-14):

The repeal of the Par Value Modification Act in 1978 was in every sense a legislative declaration that the price of \$42.22 per troy ounce was no longer recognized by the United States. We fail to see the logic in adopting as a legal standard a specified value for gold which has been specifically rejected by the United States Congress. Congress' action, moreover, as well as that taken by the other parties to the Jamaica Accords, is highly relevant to the Convention. The repeal of the Par Value Modification Act was based on a domestic and international conclusion that the official price of gold was wholly out of touch with economic and monetary reality. Since use of a fixed amount of gold as the Convention's unit was specifically designed to establish a limitation level at a certain value, this

repeal must be taken as a statement that the official price no longer reflects that specified value.

The court of appeals found that each of the other conversion mechanisms proposed by the parties was equally untenable. The court regarded use of the current French franc or the free market value of gold as inconsistent with the intent of the contracting nations to establish a non-parochial, internationally recognized, uniform and stable unit of measure for the liability limitation under the Convention (Pet. App. A-15). Use of the SDR as the basis for conversion was, in the court's view, simply unauthorized by the Convention. The court of appeals also assumed that use of the SDR would have required it to determine the number of SDRs to be awarded per kilogram of freight loss—and thus to legislate the level of limitation. Finally, the court suggested that it was precluded from adopting a unit of conversion "variable at the whim of an international body distinct from the parties to the Convention" (*id.* at A-17).

Thus, the court of appeals determined that the essential ingredient of the formula by which the Convention's limit on liability had previously been translated into United States dollars had been eliminated "as a consequence of international action followed by domestic legislation" (Pet. App. A-17). As a result, the court concluded that the parties were asking it "to select * * * as a matter of policy, a new unit of conversion" (*ibid.*). This, the court explained, was beyond its authority, because "selection of a unit of conversion and the level of value of a limitation on liability is plainly a matter to be negotiated by the parties [to the Convention]," and "such a unit must be selected either through treaty ratification by the Senate or by legislation passing both the Houses of Congress" (*id.* at A-17, A-18).^{*}

* The court of appeals announced (Pet. App. A-19) that its ruling would

apply only to events creating liability occurring 60 days from the issuance of the mandate in this case. Prospective effect is compelled by the fact that this is the first case in which a court has declined to enforce the Convention's limits on liability. * * * Parties to transactions covered by the Convention should have time to adjust their affairs to this ruling.

The court's mandate has been stayed pending the determination of these petitions for a writ of certiorari.

DISCUSSION

The court of appeals has decided important and recurring questions of law in a manner that deviates from established principles regarding the validity and enforceability of treaties. The court's decision threatens to undermine a significant international law regime to which the United States is committed and to subject this country to adverse repercussions in the international community. We accordingly urge that certiorari be granted to resolve the questions presented.

1. The principles that govern this case are well settled. "[A] treaty will not be deemed to have been abrogated or modified by a later statute unless such purpose on the part of Congress has been clearly expressed." *Cook v. United States*, 288 U.S. 102, 120 (1933). See also *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 690 (1979); *Pigeon River Improvement, Slide & Boom Co. v. Charles W. Cox, Ltd.*, 291 U.S. 138, 160 (1934). When considering questions that arise under a treaty, courts must

construe the treaty liberally to give effect to the purpose which animates it. Even where a provision of a treaty fairly admits of two constructions, one restricting, the other enlarging, rights which may be claimed under it, the more liberal interpretation is to be preferred.

Bacardi Corp. v. Domenech, 311 U.S. 150, 163 (1940). Finally, courts are to give treaties "a fair interpretation, according to the intention of the contracting parties, and so as to carry out their manifest purpose." *Wright v. Henkel*, 190 U.S. 40, 57 (1903). These principles are not rendered inapplicable by the occurrence of events that were unforeseen by the nations that are party to the instrument. See, e.g., *Pigeon River Improvement, Slide & Boom Co. v. Charles W. Cox, Ltd.*, *supra*, 291 U.S. at 157-158.

In light of these principles, the court of appeals should have engaged in a two-step analysis. First, it should have determined whether Congress clearly intended to invalidate the liability limits of the Warsaw Convention when it repealed the Par Value Modification Act. We submit that the requisite specific and unambiguous intent cannot be

found here (see pages 10-14, *infra*). Second, upon concluding that the Convention remains in force, the court should have attempted to construe its language in view of pertinent statutes, governmental policies, and economic facts to accomplish its obvious purpose. The court of appeals' ability to determine a value for the limitation on liability for the litigants in this suit strongly suggests that it could have established a value in future suits as well. Other courts have regularly done so. See page 10 note 7, *infra*.

The decision of the court of appeals is inconsistent with these principles. The court below failed to give effect to the intent of the nations that entered into the Warsaw Convention, principally because it failed to ascertain that intent. In limiting liability, and in specifying that limit in terms of the Poincare franc (consisting of a stated quantity of gold of a prescribed level of purity), the contracting nations intended to establish an internationally uniform and stable standard—and above all to impose a *limit* on air carrier liability. See Lowenfeld & Mendelsohn, *The United States and the Warsaw Convention*, 80 Harv. L. Rev. 497, 499 (1967). The treaty regime represented a compromise between the interests of transport users and carriers and the interests of the various nations party to the Convention. Transport users obtained a fixed system of nearly-absolute liability, and an opportunity to provide themselves with additional protection by declaring excess value at the time of shipment. In return, carriers received a fixed and certain standard of liability and the limitation on recovery at issue in this case. Moreover, the treaty eliminated conflicts of laws problems, involving differing standards of fault in different countries, to the advantage of all.

The court of appeals proceeded as if Article 22 of the Warsaw Convention were a prescription for liquidated damages (see Pet. App. A-14). In the court's view, if it could not translate the gold-based liability limit fixed by the Convention into dollars in a fashion that ensured that the dollar value awarded was the precise one prescribed by the Convention, it was powerless to give any effect to Article

22 (*id.* at A-5, A-17). The court of appeals thus ignored entirely the most critical facet of the intentions of the contracting parties—the unambiguous intent to adopt a ceiling on damages for loss of shipped goods. The court instead substituted a regime of completely unbounded liability.

Abrogation of the limitation on liability is the one alternative that simply cannot be squared with the provisions of Article 22. The court of appeals should have determined which of the proposed measures for translating the limits prescribed by the Convention into dollars best effectuated the intent of the framers. The court was not free to abdicate that responsibility simply because it concluded that no perfect measure of conversion was available. The court's refusal to enforce any limitation on liability at all was in clear violation of the mandate of the Convention.

2. The court of appeals substantially exaggerated the obstacles to ascertainment of the appropriate measure of conversion.⁷ Specifically, the court's explanation of its rejection of TWA's proposal to convert the Convention liability limit into dollars at a rate of \$42.22 per ounce of gold is seriously flawed.

a. Contrary to the decision of the court of appeals, the repeal of the Par Value Modification Act in 1978 does not preclude use of the last official price of gold established by that Act, \$42.22 per troy ounce, for translation of the gold-based liability limits prescribed by the Convention into dollars. Especially when the appropriate inquiry is made—*i.e.*, what measure of conversion best effectuates the intent of the parties to limit liability—the court of appeals' objections to use of this measure appear insubstantial.

The Warsaw Convention is a self-executing treaty that provides a source of rules of decision applicable in United States courts without enactment of any supplementary implementing legislation by Congress. See, *e.g.*, *Indemnity*

⁷ Although substantial changes in international currency arrangements have taken place since 1971, courts both in the United States and elsewhere have found it possible to interpret Article 22 of the Convention so as to effectuate the original intent to limit the liability of carriers thereunder. See Brief of the International Air Transport Association 17 nn. 51 & 52. See also Pet. App. A-12 to A-13 & nn. 14-19. These decisions strongly suggest that the court of appeals could have given effect to the Convention.

Insurance Co. of North America v. Pan American Airways, Inc., 58 F. Supp. 338 (S.D.N.Y. 1944); *Garcia v. Pan American Airways, Inc.*, 269 App. Div. 287, 55 N.Y. Supp. 317, aff'd, 295 N.Y. 852, 67 N.E.2d 256, cert. denied, 329 U.S. 741 (1940). See generally *Bacardi Corp. v. Domenech, supra*, 311 U.S. at 161. Neither the Par Value Modification Act fixing the value of \$42.22 per troy ounce of gold for international exchange purposes, Pub. L. No. 93-110, Section 1, 87 Stat. 352, nor any of its predecessors that fixed other prices, or authorized the President to do so (see, e.g., Par Value Modification Act, Pub. L. No. 92-268, Section 2, 86 Stat. 116 (\$38 per troy ounce); Act of May 12, 1933, ch. 25, Section 43(b)(2), 48 Stat. 52 (authorizing President to fix by proclamation the weight of the gold dollar)), can properly be regarded as enabling legislation necessary to the enforcement of the Convention in United States courts. Accordingly, the repeal of those provisions, designed to fulfill other purposes, does not have the effect of rendering the liability limitation of the Convention unenforceable.

On March 31, 1978, one day before the Second Amendment of the Articles of Agreement of the International Monetary Fund took effect (see page 4 note 4, *supra*), dollar equivalents for the liability limits prescribed by the Warsaw Convention were a determinate quantity. Pursuant to Section 9 of Pub. L. No. 94-564, 90 Stat. 2661, the Par Value Modification Act was repealed effective April 1, 1978. There is no indication in the language or the legislative history of Pub. L. No. 94-564 that repeal of the Par Value Modification Act was intended to affect, much less abrogate, the liability limitation established by Article 22 of the Convention. Rather, the repeal of the Par Value Modification Act was part of legislation that amended the Bretton Woods Agreements Act and accepted the new Articles of Agreement of the IMF on behalf of the United States. See page 4 note 4, *supra*. Amendment of these articles was prompted by the fact that IMF member nations no longer wished to maintain par values as required under the original IMF Agreement. Accordingly, central to the new articles was the abolition of the requirement of par value maintenance that had been placed upon the United States and other countries by the original Bretton Woods Agree-

ments. The Par Value Modification Act was thus repealed as part of a process of reordering of international monetary affairs. As the House Report on H.R. 13955, 94th Cong., 2d Sess. (1976), which became Pub. L. No. 94-564, explained, under the new international regime "the U.S. has no legal obligations to establish and maintain a par value for the dollar." H.R. Rep. No. 94-1284, 94th Cong., 2d Sess. 13 (1976). Congress was not abandoning a unit of conversion; it was simply recognizing in domestic legislation that the United States had been relieved by international agreement of its undertaking to guarantee the basis for interchangeability of gold and dollars.

Thus, the court of appeals was plainly wrong in concluding that, by repealing the Par Value Modification Act, Congress "specifically rejected" (Pet. App. A-14) use of the price of \$42.22 per troy ounce of gold for purposes of implementing Article 22 of the Warsaw Convention. There is no suggestion anywhere that Congress intended to preclude such use,^{*} and legislative silence alone cannot satisfy the requirement of clear expression necessary to abrogate a treaty. See *Weinberger v. Rossi*, 456 U.S. 25, 32 (1982); see page 8, *supra*.

Nor was the repeal "relevant to the Convention" in the sense the court of appeals suggested, because repeal did not reflect the view that "the official price of gold was wholly out of touch with economic and monetary reality" (Pet. App. A-14). On the contrary, the repeal of the Par Value Modification Act was a domestic response to an international consensus that gold was no longer a satisfactory international unit of account. Among the factors underlying this consensus were the insufficiency of the supply of gold and the rise of a previously unknown speculative free market in gold that interfered with its utility as a common monetary unit. See R. Lipsey & P. Steiner, *Economics* 713-725 (1978). But abandonment of gold as a unit of account between nations for purposes of the International Monetary

^{*} The court of appeals acknowledged that "Congress may not have focused explicitly upon the Convention in repealing [the Par Value Modification] Act" (Pet. App. A-18).

Fund in no way suggested that the prevailing value of gold was no longer to be employed under *other* treaty regimes, that *did continue* to provide for such use. This is especially so because continued use of the fixed rate of \$42.22 per troy ounce of gold provided by the last official value of gold rather precisely meets the expectations of the framers of the Warsaw Convention respecting the limitation of liability adopted. See page 9, *supra*. The needs of the IMF nations to ensure flexibility in exchange rates and to insulate international monetary transactions from the confounding effect of the emerging free market in gold—factors that prompted the international decision to abandon the fixed exchange rates based on a fixed par value for the dollar defined in terms of gold—simply have no application to the purposes of Article 22 of the Warsaw Convention.

In sum, the repeal of the Par Value Modification Act did not preclude resort to the price of \$42.22 per troy ounce of gold to implement the liability limitation prescribed by the Warsaw Convention. That conversion rate, which served to effectuate the intent of the parties on March 31, 1978, was not rendered ineffective for that purpose one day later simply because express statutory authority prescribing an official gold price for other purposes was repealed. Cf. *United States v. Bornstein*, 423 U.S. 303, 307 n.1 (1976).

b. The price of \$42.22 per troy ounce of gold was not without official standing under United States law after April 1, 1978. Pursuant to newly codified 31 U.S.C. 5117(b) (see Pub. L. No. 97-258, 96 Stat. 984) formerly 31 U.S.C. 405b, that value is used to govern issuance of gold certificates by the United States Treasury. And it is used to express the value of the gold reserves of the United States for general purposes. *1 Report of the Commission on the Role of Gold in the Domestic and International Monetary System* 13 (Mar. 1982). Moreover, the rate of \$42.22 per troy ounce of gold has historically been used by the United States to determine the dollar amount of its subscription obligations to the capital stock of four major international financial institutions, the International Bank for Reconstruction and Development (the World Bank), the

Inter-American Development Bank, the International Development Association, and the Asian Development Bank.⁹

The court of appeals dismissed as irrelevant to the issue presented the continued use of the \$42.22 conversion rate to value gold held in the United States Treasury (Pet. App. A-14 n.20). But what the court of appeals failed to recognize is that it was the abandonment of the \$42.22 conversion rate for purposes likewise unrelated to the Warsaw Convention—*i.e.*, under the IMF Articles of Agreement—that is not relevant here. The various examples cited above of continued use of the \$42.22 price merely illustrate that Congress did not reject use of that price for all purposes. In these circumstances, repeal of the Par Value Modification Act falls far short of a clear legislative decision to abrogate the Convention that would render the \$42.22 conversion rate unavailable for use in United States courts.

c. We agree with the court of appeals' conclusion (Pet. App. A-15), although not with all of its supporting reasoning, that use of the exchange value of the modern French franc or of the free market value of gold to translate the liability limitation specified by the Warsaw Convention into dollars would be directly contrary to the intentions of the contracting nations. Use of the former measure is precluded because the parties carefully specified a unit distinct from the value of the modern franc—the Poincare franc consisting of a stated quantity of gold. Use of the free market price of gold is inappropriate because the parties plainly intended to adopt a relatively fixed value unaffected by the extreme fluctuations that have recently beset the free market in unmonetized gold—a market unknown at the time the Convention entered into force. The fluctuations induced by private speculation in gold have no place in the liability limitation regime of the Convention.

On the other hand, the SDR constitutes a potential alternative choice for implementation of the Warsaw Convention's limitation on liability. While we do not advocate the

⁹ The articles of agreement of those institutions employ as a unit of account dollars of a specified weight and fineness of gold.

use of the SDR as a conversion mechanism, it is highly instructive that the dollar value of the Convention liability limitation arrived at through use of the SDR mechanism proposed by TWA is nearly identical to that provided by the official price of gold. Indeed, if translated into round figures, as is permitted by Article 22(4) of the Convention, the liability limitation in dollars is the same under either method of calculation.¹⁰ Because the value of the SDR is computed by reference to a weighted basket of major currencies, it is relatively stable compared to any single currency over the long run. Indeed, the near identity of the liability limitations computed by the alternate routes is a telling indication that the court of appeals erred in suggesting that "the official price of gold was wholly out of touch with economic and monetary reality" (Pet. App. A-14).

Conversion of the Warsaw Convention liability limits into dollars at the rate of \$42.22 per troy ounce of gold therefore would effectuate the manifest purpose of the contracting nations: to provide a stable and binding limitation upon the liabilities incurred by international air carriers.

3. Because the question presented by TWA's petition is a substantial one that arises frequently in litigation and that affects important interests of the United States, we believe that it is appropriate for resolution by this Court. The Senate's recent vote withholding consent to ratification of Montreal Protocols 3 and 4,¹¹ which would have amended the Warsaw Convention to redefine the stated liability limits in terms of SDRs, enhances rather than detracts from the exigency of further review. The Senate's action bespeaks no controlling view as to the enforceability of the existing Convention limits—which remain part of our

¹⁰ The court of appeals apparently did not consider the actual dollar liability limits that result from application of the alternative conversion mechanisms to be germane to its analysis. But because the cardinal objective in a case such as this must be to give practical effect to the intention of the contracting nations, it is highly relevant that alternative measures between which the court of appeals deemed itself unable to decide would produce nearly identical judgments.

¹¹ See Supplemental Memorandum of Potential Intervenors 1.

law—in United States courts. But the Senate's action means, as a practical matter, that the present Convention regime will remain in force for the foreseeable future. Because the Second Circuit encompasses New York City, the major gateway for international air traffic entering the United States, and virtually every international air carrier can be sued there, the decision of the court of appeals will have a far-reaching and unsettling effect.¹²

We note, however, our uncertainty whether TWA's petition, standing alone, brings before the Court a case or controversy within the Article III jurisdiction of this Court. This is a suit for money damages, not an action for declaratory relief. Because the court of appeals affirmed the judgment of the district court limiting TWA's liability *in this case* to an amount calculated at the rate of \$42.22 per ounce of gold—a standard advocated by TWA—it is arguable that TWA's petition does not attack the judgment of the court of appeals and thus brings no actual controversy before the Court in the setting of a concrete case. TWA is, in effect, seeking review of the legal rule that the court of appeals has announced it intends to apply to *future* cases.¹³

We see no need for the Court to resolve this question, at least at the present juncture. Franklin Mint also has filed a certiorari petition, which seeks review of the court of appeals' judgment limiting its recovery in this case. Franklin

¹² We note that the United States District Court for the Central District of California has recently followed and extended the declaration of the court of appeals in this case, holding that the personal injury liability limitation of the Warsaw Convention stated in terms of Poincare francs is unenforceable because indeterminate, and applying that holding to the case before it. *In re Aircrash at Kimpo International Airport, Korea on November 18, 1980*, MDL-482 (Feb. 15, 1983).

¹³ The court of appeals purported to declare the Warsaw Convention liability limit prospectively unenforceable. See page 7 note 6, *supra*. Because the court below did not apply that rule to this case, and because the relief sought by Franklin Mint in this action is purely monetary, it is arguable that that declaration forms no part of the court of appeals' judgment. If that is so, TWA's petition merely challenges the court of appeals' reasoning and not its judgment. This Court, however, "review[s] judgments, not statements in opinions" (*Mississippi University for Women v. Hogan*, No. 81-406 (July 1, 1982), slip op. 6 n.7).

Mint's petition, which was filed within 90 days of the order denying rehearing (see 82-1465 Pet. 2), presents the questions (1) whether the liability limits of the Warsaw Convention remain enforceable, (2) if not, whether the Convention limits nevertheless should be applied in this case, and (3) if the Convention limits retain any effectiveness, what is the proper standard for conversion. Franklin Mint's petition thus places before the Court a concrete controversy, resolution of which entails consideration of the issues raised by TWA.

CONCLUSION

The petitions for a writ of certiorari should be granted.

Respectfully submitted.

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APRIL 1983

AUG 29 1983

ALEXANDER L. STEVAS
CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1983

TRANS WORLD AIRLINES, INC.,

Petitioner,

—v.—

FRANKLIN MINT CORPORATION, FRANKLIN MINT LIMITED,
and MCGREGOR, SWIRE AIR SERVICES LIMITED,

Respondents.

FRANKLIN MINT CORPORATION, FRANKLIN MINT LIMITED,
and MCGREGOR, SWIRE AIR SERVICES LIMITED,

Petitioners,

—v.—

TRANS WORLD AIRLINES, INC.,

Respondent.

ON WRITS OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF TRANS WORLD AIRLINES, INC.

Petitioner in No. 82-1186 and

Respondent in No. 82-1465

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August 29, 1983

QUESTIONS PRESENTED

1. Whether the courts of the United States may abrogate a provision of a treaty which is both constitutionally sound and capable of enforcement?

2. Whether the court of appeals erroneously failed to exercise its constitutional responsibility to construe the Warsaw Convention's limitation of liability provisions to effectuate the intent of the signatory States in light of changed circumstances?

3. What is the proper conversion factor for the gold franc provisions of the Warsaw Convention in view of the unequivocal intent of the Convention's signatories to fix air carrier limits of liability at a predictable, stable and definite level?

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1983

Nos. 82-1186, 82-1465

TRANS WORLD AIRLINES, INC.,

Petitioner,

—v.—

FRANKLIN MINT CORPORATION, FRANKLIN MINT LIMITED,
and MCGREGOR, SWIRE AIR SERVICES LIMITED,

Respondents.

FRANKLIN MINT CORPORATION, FRANKLIN MINT LIMITED,
and MCGREGOR, SWIRE AIR SERVICES LIMITED,

Petitioners,

—v.—

TRANS WORLD AIRLINES, INC.,

Respondent.

ON WRITS OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF TRANS WORLD AIRLINES, INC.

Petitioner in No. 82-1186 and

Respondent in No. 82-1465

PRELIMINARY STATEMENT

Trans World Airlines, Inc. ("TWA"),¹ petitioner in No. 82-1186 and respondent in No. 82-1465, respectfully submits this brief on the merits in these consolidated cases.²

¹ In compliance with Rule 28.1 of this Court, TWA states that as of the date hereof 81.34 percent of its common shares are owned by Trans World Corporation and 18.66 percent of its shares are publicly held.

² Cases No. 82-1186 and No. 82-1465 were consolidated pursuant to an Order of this Court entered on June 13, 1983.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit is reported at 690 F.2d 303 (2d Cir. 1982) and is reprinted in the Joint Appendix hereto at JA190.³ The opinion of the United States District Court for the Southern District of New York is reported at 525 F. Supp. 1288 (S.D.N.Y. 1981) and is reprinted at JA187.

JURISDICTION

This Court's jurisdiction exists by virtue of 28 U.S.C. § 1254(1) (1976). Both TWA and Respondents-Petitioners Franklin Mint Corporation, Franklin Mint Limited, and McGregor, Swire Air Services Limited (collectively, "Franklin Mint") petitioned this Court for writs of certiorari in order to review the judgment and opinion of the United States Court of Appeals for the Second Circuit. On June 13, 1983, both petitions for certiorari were granted. 51 U.S.L.W. 3879 (U.S. June 13, 1983) (Nos. 82-1186 and 82-1465).

CONSTITUTIONAL AND TREATY PROVISIONS INVOLVED

Article II, Section 2, Clause 2 of the United States Constitution and Article 22 of the Warsaw Convention are involved herein.⁴

³ References in the form "JA____" are to the Joint Appendix to these consolidated cases.

⁴ The applicable provisions of the United States Constitution and the Warsaw Convention are set forth in the Appendix to TWA's petition for certiorari at A34 and A35, respectively.

All references to the "Warsaw Convention" or to the "Convention" are to the Convention for the Unification of Certain Rules Relating to International Transportation by Air, *opened for signature* Oct. 12, 1929, 49 Stat. 3000, T.S. No. 876, 137 L.N.T.S. 11, *reprinted in* 49 U.S.C. § 1502 note (1976).

STATEMENT OF THE CASE

Introduction

This action arises out of the loss, during a TWA flight, of four packages of numismatic materials allegedly valued at \$250,000. Since it is undisputed that the Warsaw Convention provides the sole basis for liability herein (JA15-16), the only question before the lower courts was the proper interpretation of the limitation of liability provisions of that Convention. In view of that narrow question, both the legal and factual background of the action were stipulated to by the parties and ordered by the district court in a Stipulation and Pre-Motion Order (the "Pre-Motion Order"). (JA13).

The Pre-Motion Order provides that the Warsaw Convention governs the legal relationship between the parties (JA15);⁵ that the sole basis for liability herein arises under the Convention (JA15-16); and that TWA is entitled to limit its liability in accordance with the provisions of Article 22 thereof. (JA15-16). With respect to the basic facts underlying the action, the Pre-Motion Order provides that the four packages of numismatic materials in question, weighing 714 pounds (JA14-15), were delivered by Franklin Mint to TWA for shipment by air to London Heathrow Airport, England (JA15); that the total freight charge to Franklin Mint was \$544.96 (JA15); that Franklin Mint made no special declaration of value at the time the packages were delivered to TWA⁶ (JA15); and that the shipment never reached its destination. (JA15).

5 The Warsaw Convention is applicable to all carriage which falls within the definition of "international transportation" set forth in Article 1(2) thereof. As the Pre-Motion Order provides, the carriage in question is within that definition. (JA15).

6 Franklin Mint could have avoided the Convention's limitation of liability by making a special declaration of value pursuant to Article 22(2) and paying an additional charge for full coverage. However, it chose not to do so. (JA15). It can only be assumed that Franklin Mint, an experienced and sophisticated shipper of air freight, chose to insulate itself against the risk of loss through its own insurance.

In accordance with the terms of the Pre-Motion Order, TWA moved for partial summary judgment seeking to limit its maximum liability pursuant to Article 22 of the Warsaw Convention (JA187, 525 F. Supp. at 1289); the district court granted TWA's motion, limiting its liability to \$6,475.98 (JA189, 525 F. Supp. at 1289); Franklin Mint moved for reargument, which was denied and, thereafter, appealed.

On appeal, the Second Circuit, although technically affirming the district court's decision, held that 60 days from the issuance of its mandate the Convention's limit on liability would be "unenforceable in United States Courts."⁷ (JA209, 690 F.2d at 311-12). Subsequent to the Second Circuit's denial of TWA's petition for a rehearing, TWA petitioned this Court for certiorari primarily on the ground that by prospectively abrogating the Convention's limitation of liability provisions, the Second Circuit exceeded its constitutional powers. Franklin Mint responded to TWA's petition with its own petition for certiorari, contending that the Second Circuit's decision should not have been limited to prospective application. On June 13, 1983, this Court granted both petitions for certiorari.

The Warsaw Convention

The Warsaw Convention was drafted at international conferences held in Paris in 1925 and in Warsaw in 1929. It was adhered to in 1934 by the United States, which continues to regard the Convention as a binding international agreement. See U.S. Dep't of State, *Treaties in Force* 207-08 (1983). The Convention is in force in more than 120 States⁸ and is of unquestionable significance to the aviation industry:

[T]he Warsaw Convention is by far the most widely adopted treaty concerning private international law and after the United Nations Charter one of the most widely

⁷ Upon the motion of TWA, the Second Circuit has stayed the issuance of its mandate pending this Court's decision. (JA210).

⁸ A list of the nations adhering to the Convention is contained in U.S. Dep't of State, *Treaties in Force* 207-08 (1983).

adopted of all treaties (A. Lowenfeld, *Aviation Law* § 4.11, at 7-98 (2d ed. 1981)).

The essential purposes of the Convention are: (i) "to establish a uniform body of world-wide liability rules to govern international aviation, which would supersede . . . the scores of differing domestic laws" (*Reed v. Wiser*, 555 F.2d 1079, 1090 (2d Cir.), *cert. denied*, 434 U.S. 922 (1977)); (ii) to limit the maximum extent of a carrier's potential liability for damages (see Lowenfeld & Mendelsohn, *The United States and the Warsaw Convention*, 80 Harv. L. Rev. 497, 499-500 (1967)); and (iii) to set a "reliable and consistent basis for recovery for injury or damage to persons or property" ("Warsaw Convention Liability Limits," Memorandum prepared by John Golden, Director, Bureau of Compliance and Consumer Protection,⁹ Civil Aeronautics Board, dated May 20, 1981 (the "Golden Memorandum"))¹⁰ (JA34), which would provide uniform recoveries for claimants and foreseeable and insurable liabilities for airlines (see Report of Secretary of State Cordell Hull, Mar. 31, 1934, [1934] U.S. Av. R. 240, 242).

The Limitation of Liability and the Changing Role of Gold in the World Economy

In order to ensure that the limits of liability under the Convention would remain uniform and stable, the drafters of the Convention expressed the limitation in terms of the French

⁹ This Bureau is now known as the Office of Congressional, Community and Consumer Affairs.

¹⁰ The staff of the Civil Aeronautics Board (the "CAB") has prepared several memoranda concerning the method for converting Warsaw gold francs into United States currency: the Golden Memorandum mentioned above (JA33); a Memorandum prepared by Jeffrey Gaynes, Legal Division, Bureau of International Aviation, CAB, dated April 18, 1980 (JA60); and a Memorandum by Patricia Kennedy, Policy Development Division, Bureau of Consumer Protection, CAB, dated March 18, 1980 (JA42).

gold franc (colloquially known as the Poincaré franc) which was defined as consisting of 65-1/2 milligrams of gold of millesimal fineness nine hundred.¹¹ The actual limit of liability was fixed at 250 French gold francs per kilogram of lost cargo (Article 22(2)), convertible into national currency in round figures (Article 22(4)).¹²

The use of a gold franc clause as a medium of conversion is readily understandable when it is considered in light of the international gold exchange system in existence when the Convention was drafted.

In 1929, when the Warsaw Convention was adopted, currencies were either expressed in gold or easily convertible to gold using an official rate. . . .

The drafters of the Warsaw Convention thus foresaw no ambiguity in their use of gold as the unit of account because at the time governments had an official rate of gold which was easily discernible and virtually identical to the market rate of gold, to the extent that a market rate existed at all. (Golden Memorandum, *supra* p. 5, at JA36).

Thus, the Warsaw signatories adopted a limitation of liability based upon a gold franc clause in order to ensure stable and predictable limits of liability (*see Asser, supra* note 11, at 664); "to avoid, as far as the limits are concerned, the effects of devaluations which would result from having the limits expressed in any local currency" (H. Drion, *Limitations of Liabilities in International Air Law* 183 (1954)); and to assure that damages awarded by different countries would be uniform in value (*see Asser, supra* note 11, at 664).

¹¹ The French gold franc takes its common name from the French prime minister under whose government its gold content was set. *See Asser, Golden Limitations of Liability in International Transport Conventions and the Currency Crisis*, 5 J. Mar. L. & Com. 645, at 645 (1974) (hereinafter "Asser").

¹² The relevant text of Article 22 is quoted *infra* p. 22.

A review of the *travaux préparatoires*¹³ of the Convention confirms that the gold value clause was employed in order to provide stable and foreseeable limits of liability.

As the Swiss delegate stated:

Naturally, when we prepared our text, the French franc was variable, it has been stabilized since. But the fact that a currency has been stabilized does not imply that it is a final thing; a law can always modify another law. For this reason, in Switzerland, we have preferred to stick to the gold standard

We would not be opposed to refer to the French franc, but to the gold French franc, that is to say, based on a weight of gold at such and such one thousandth.

Naturally, one can say "French franc" but the French franc, it's your national law which determines it, and one need have only a modification of the national law to overturn the essence of this provision. We must base ourselves on an international value, and we have taken the dollar. Let one take the gold French franc, it's all the same to me, but let's take a gold value. (R. Horner & D. Legrez, *Second International Conference on Private Aeronautical Law, Minutes, Warsaw, October 4-12, 1929*, at 89-90 (1975)).

Indeed, from the inception of the Convention until 1968, gold clearly provided the stability and insulation from unilateral acts of devaluation by individual nations, which the drafters intended. Converting the Article 22 limitation into United States dollars involved nothing more than a simple mathematical computation employing the official rate of gold

13 The *travaux préparatoires*, or legislative history, clearly provide a basis for ascertaining the treaty's purposes and intent. See, e.g., *Choctaw Nation of Indians v. United States*, 318 U.S. 423, 431-32 (1943); *Cook v. United States*, 288 U.S. 102, 112 (1933); *Day v. Trans World Airlines, Inc.*, 528 F.2d 31, 34 (2d Cir. 1975), *cert. denied*, 429 U.S. 890 (1976); *Block v. Compagnie Nationale Air France*, 386 F.2d 323, 336-38 (5th Cir. 1967), *cert. denied*, 392 U.S. 905 (1968).

(then the only rate of gold) which remained virtually stable throughout that period. (JA24; see graph at JA30).

However, for a variety of reasons arising from a changing world economy, the central banks of most States instituted procedures in 1968 which separated their official gold transactions from other gold dealings. (JA21). This resulted in a "two-tier" period, during which the stable official price of gold existed side by side with a constantly fluctuating commodity price for gold. (JA21).

Notwithstanding the existence of both an official price and a market price for gold throughout the two-tier period, there was no difficulty converting the Article 22 limitation into United States currency. Pursuant to a series of CAB orders, the Warsaw gold provisions were converted into national currency at the official rate of gold, and the presently controlling CAB regulation, Order 74-1-16, dated January 3, 1974, so provides.¹⁴

In fact, it was not until 1978, when the International Monetary Fund (the "IMF")¹⁵ member nations ceased employing an official price of gold for most purposes, that any question of law arose in the United States with respect to the method of conversion under the Warsaw gold provisions. Although the two-tier system had been in effect since 1968, the market price of gold did not differ significantly from the official rate of \$35 per ounce until 1970, when this situation began to change radically. (JA21). Thus, in late 1973, when the official price of

¹⁴ The full text of Order 74-1-16 is set forth at JA54.

¹⁵ The IMF is affiliated with the United Nations. It was organized at the Bretton Woods Conference in 1944 to promote international monetary cooperation, to facilitate the growth of international trade, and to assist in the establishment of a multilateral system of payments for currency transactions among member States. (JA19-20). The United States became a member of the IMF in 1945. Articles of Agreement of the International Monetary Fund, *opened for signature* Dec. 27, 1945, 60 Stat. 1401, T.I.A.S. No. 1501, 2 U.N.T.S. 39; enabling legislation, Bretton Woods Agreements Act of 1945, Pub. L. No. 79-171, 59 Stat. 512, codified at 22 U.S.C. § 286 (1976).

gold was fixed at \$42.22 an ounce, the commodity price of gold rose to \$200 an ounce. (JA24). Finally, in 1975, in an attempt to ameliorate the severe economic pressures resulting from this instability in the price of gold, the IMF formulated a plan, known as the Jamaica Accords, to delete most references to gold in its Articles of Agreement and to replace the official function of gold with Special Drawing Rights ("SDRs"). Articles of Agreement of the International Monetary Fund (Second Amendment), *approved* Apr. 30, 1976, 29 U.S.T. 2203, T.I.A.S. No. 8937 (hereinafter "Second Amendment to the IMF Articles of Agreement"); enabling legislation, Bretton Woods Agreements Act of 1976, Pub. L. No. 94-564, 90 Stat. 2660, codified at 22 U.S.C. § 286e-5 (1976). (See discussion at JA21-22).¹⁶

As is fully set forth in the record, and as was undisputed in the courts below, the SDR is a stable international unit of account, valued on the basis of a basket of five national currencies, which does not have a competing use as a commodity. (JA22-23). Thus, SDRs are insulated from free market speculation and other difficulties which led to instability in the price of gold and to the ultimate breakdown of gold as an international unit of account. (JA23). Employed as a medium of exchange between governments, central banks and the IMF, SDRs have replaced gold's international monetary function

¹⁶ The concept of Special Drawing Rights was approved by the Board of Governors of the IMF in 1967. Under the IMF's plan, a "Special Drawing Account" was established to facilitate transactions among members, and SDRs became a supplement to existing reserve assets. Member States were allocated a number of SDRs, and a State having a balance of payments deficit could use them to settle its accounts by selling them to an IMF designated country. Designated countries were obligated to take SDRs and to provide convertible currency in return. Although SDRs were initially valued in terms of gold (1 SDR equal to 0.888671 gram of fine gold, which was equal to \$1 U.S. at the rate of \$35.00 per ounce), the Second Amendment to the IMF Articles of Agreement severed the link between gold and SDRs for virtually all purposes. (JA21-22). See Silard, *Carriage of the SDR by Sea: The Unit of Account of the Hamburg Rules*, 10 J. Mar. L. & Com. 13, 18 (1978).

and "serve as the cornerstone of the new international system of finance." P. Samuelson, *Economics* 612 (11th ed. 1980); see Gold, *Gold in International Monetary Law: Change, Uncertainty, and Ambiguity*, 15 J. Int'l L. & Econ. 323, 354 (1981). As a result, "[t]he SDR has first claim to recognition as the unit of account to replace gold in universal international organizations." J. Gold, *SDRs, Currencies, and Gold*, IMF Pamphlet Series No. 33, at 96 (1980).¹⁷

In sum, since the demise of the two-tier system, SDRs have become the international unit of account and gold has become a fluctuating commodity which varies in value in the same manner as any other commodity, such as wheat, silver, soybeans or pork bellies. (JA19, 24-25; see graph at JA32).

The Montreal Protocols

Realizing that gold's new status affected its viability as a conversion factor for the Convention's limitation of liability provisions, the Warsaw signatories met at Montreal in 1975 to attempt "to deal with the changes in the role of gold in international monetary transactions." Golden Memorandum, *supra* p. 5, at JA39. Their solution, embodied in the Montreal Protocols, was the substitution of SDRs for gold as the conversion factor for the limitation of liability provisions of Article 22.¹⁸ The decision in favor of SDRs was based on the

¹⁷ At least 17 international organizations and 14 multilateral agreements have adopted the SDR as the unit of account for a variety of purposes, including use as a factor for converting gold value clauses contained in international agreements (drafted prior to the time gold became a fluctuating commodity) into national currencies. See J. Gold, *SDRs, Currencies, and Gold*, *supra*, at 37-39.

¹⁸ There have been three prior modifications of the Warsaw System: (i) the Hague Protocol, *done* Sept. 28, 1955, 478 U.N.T.S. 371, *reprinted* in A. Lowenfeld, *Aviation Law* 955 (2d ed. Doc. Supp. 1981); (ii) the Montreal Agreement of 1966, a private agreement among most international air carriers, *reprinted* in A. Lowenfeld, *Aviation Law* 971 (2d ed. Doc. Supp. 1981); and (iii) the Guatemala City Protocol, *done* Mar. 8, 1971, *reprinted* in A. Lowenfeld, *Aviation Law* 975 (2d ed. Doc. Supp. 1981). Although neither the Hague Protocol nor the Guatemala City Protocol has been ratified by the United States, both

fact that SDRs are relatively stable, have replaced gold as the international unit of account, and will effectuate the drafters' goal of predictable and stable limits of liability. See Golden Memorandum, *supra* p. 5, at JA39.

As one commentator has observed:

[T]he new Warsaw limit [using SDRs as the unit of account] is intended to be as faithful a translation as possible of . . . poincaré francs at the "old" official price for gold. (McGilchrist, *Four New Protocols to the Warsaw Convention*, 1976 Lloyd's Mar. & Com. L. Q. 186, 187).

During the meetings at Montreal, the United States "took the lead" in suggesting SDRs as the standard of conversion¹⁹ and signed Protocols 3 and 4,²⁰ which adopt SDRs as the Article 22 unit of account. On November 17, 1981, the Senate Committee on Foreign Relations reported in favor of ratification of those Protocols. Senate Comm. on Foreign Relations, Montreal Aviation Protocols Nos. 3 and 4, S. Exec. Rep. No. 45, 97th Cong., 1st Sess. 5 (1981). However, on March 8, 1983, the United States Senate, by a vote of 50 to 42 in favor of ratification of Montreal Protocols 3 and 4, withheld its consent to those Protocols. Thereafter, the majority leader moved for reconsideration and the matter remains on the Senate calendar. Senate Exec. Sess., Montreal Aviation Protocols Nos. 3 and 4, 129 Cong. Rec. S2270, S2279 (daily ed. Mar. 8, 1983) (statement of Sen. Baker).

(footnote continued from previous page)

Protocols provide for definite and fixed limits of liability and have been looked to as indicia of the signatories' subsequent conduct for purposes of construing provisions of the Convention. See, e.g., *Day v. Trans World Airlines, Inc.*, 528 F.2d 31, 36 n.15 (2d Cir. 1975), cert. denied, 429 U.S. 890 (1976).

¹⁹ See A. Lowenfeld, *Aviation Law* § 6.51, at 7-171 (2d ed. 1981); see also Fitzgerald, *The Four Montreal Protocols to Amend the Warsaw Convention Regime Governing International Carriage by Air*, 42 J. Air L. & Com. 273, 325, 329-30 (1976).

²⁰ Protocols 3 and 4 are reprinted in A. Lowenfeld, *Aviation Law* 985 (2d ed. Doc. Supp. 1981).

The Decisions of the Courts Below

TWA moved for partial summary judgment seeking to limit its liability in accordance with Article 22 of the Warsaw Convention. TWA argued that the Warsaw gold provisions might be converted into United States currency by three alternative methods: (i) the last official price of gold in the United States; (ii) the SDR; and (iii) the exchange value of the modern French franc. (JA188, 525 F. Supp. at 1289). Franklin Mint responded that the appropriate basis for conversion is the market price of gold. (JA188, 525 F. Supp. at 1289).²¹

After briefing and oral argument, the district court concluded that the appropriate conversion factor is "the last official price of gold in the United States." (JA189, 525 F. Supp. at 1289). That holding was based upon the fact that the last official price of gold "has—arguably, at least—been espoused by the Civil Aeronautics Board ('CAB'), the government agency most intimately concerned with the transaction at hand" and has been "used by all domestic carriers—including TWA—in calculating the dollar value of the Article 22 limitation." (JA188, 525 F. Supp. at 1289).

Although the court of appeals technically affirmed the district court's decision, it also held, *sua sponte*, that 60 days after the issuance of its mandate, the Warsaw limitation of liability provisions would become "unenforceable in United States Courts." (JA209, 690 F.2d at 311-12). The Second Circuit based its decision upon the determination that each of the potential conversion units proffered by the parties "ap-

²¹ In both the district court and the court of appeals, TWA argued that the modern French franc might be employed as a conversion factor for the Warsaw gold provisions because it is infinitely more stable than the market price of gold. Although there is some authority for this position (see *Kinney Shoe Corp. v. Alitalia Airlines*, 15 Av. Cas. (CCH) 18,509 (S.D.N.Y. 1980)), as will be demonstrated below, either the last official price of gold or SDRs is the most appropriate conversion factor. Therefore, TWA will not submit further argument with respect to the modern French franc as a potential third choice.

pears to have a devastating argument against it." (JA195, 690 F.2d at 306). As a result, the Second Circuit concluded:

While the Convention has not been formally abrogated, enforcement by national judicial tribunals is impossible without their picking and choosing among alternative units of conversion according to their view of which is best as an initial policy matter. We have no power to select a new unit of account. We thus hold the Convention's limitation of liability unenforceable by United States Courts. (JA195, 690 F.2d at 306).

As will be demonstrated below, neither the Second Circuit's reasoning nor its conclusion can withstand scrutiny. It is not only possible for the courts to select a unit of account without engaging in a forbidden policy decision; under settled principles of law it is their duty to do so.

SUMMARY OF ARGUMENT

In declaring the Warsaw Convention's limitation of liability provisions unenforceable, the Second Circuit noted that it had no power to abrogate a treaty, but rather that the power to do so resides in the coordinate branches of the government. Having reached that conclusion, the Second Circuit found Congress' repeal of the Par Value Modification Act, which set the official price for gold in the United States, to have effectively abrogated the Warsaw Convention, inasmuch as that repeal led the court to reject the only conversion factor which it viewed as otherwise viable—the last official price of gold. However, in so holding, the Second Circuit totally ignored the well-settled rule that a treaty will not be deemed to be abrogated or modified by a later statute unless such purpose on the part of Congress has been affirmatively expressed. As the statute repealing the Par Value Modification Act makes no reference to the Warsaw Convention and the Second Circuit pointed to no other congressional or executive act impinging upon the Warsaw limits, those limits clearly must be enforced.

The foregoing conclusion is underscored by the fact that no other signatory nation which has considered the issue has found the Warsaw limits unenforceable, as well as by the fact that the Executive, the governmental branch most intimately concerned with the conduct of foreign policy, has specifically stated that it views the Warsaw limits to be a binding treaty obligation of the United States.

As the Warsaw limits have not been abrogated by the coordinate branches of the government and cannot be abrogated by the courts, the judiciary must, under settled canons of construction, interpret the Convention in a manner which will carry out the intent of its drafters. There is no doubt that the drafters stated the limits in terms of a gold value clause in order to ensure stable and predictable limits of liability. Since use of the market price of gold as the conversion factor would result in widely fluctuating and unpredictable limits, it is clear that the last official price of gold, the use of which would lead to the stable limits envisioned by the drafters, is the proper conversion factor. The last official price of gold has consistently been applied as the conversion factor in the United States and is the medium of conversion employed by the presently controlling CAB order. In short, use of the last official price of gold is consistent with Constitutional requirements, with the canons of treaty construction, and with long-standing usage in the United States.

Although use of the last official price of gold as the Warsaw conversion factor would fully comport with both Constitutional requirements and the canons of treaty construction, SDRs are an alternative conversion factor which would also conform to the foregoing criteria. SDRs are a stable international unit of account; they have taken the place of gold in the world economy; and they are easily converted into gold value by a formula which has been accepted by various segments of the international community. As a result, the use of SDRs would fully comply with the drafters' intent. Therefore, SDRs are an appropriate alternative to the last official price of gold as the Warsaw conversion factor.

ARGUMENT

POINT I

THE COURT OF APPEALS EXCEEDED ITS CONSTITUTIONAL POWERS BY ABROGATING THE LIMITATION OF LIABILITY PROVISIONS OF THE WARSAW CONVENTION—THOSE PROVISIONS SHOULD CONTINUE TO BE ENFORCED EMPLOYING THE LAST OFFICIAL PRICE OF GOLD AS THE CONVERSION FACTOR

In declaring the limitation of liability provisions of the Warsaw Convention unenforceable, the court of appeals was clearly mindful that its decision touched upon delicate constitutional questions relating to the separation of powers between the judiciary and the other branches of the federal government. Indeed, the Second Circuit itself observed that with respect to treaties, "great difficulty may arise in ascertaining where that line [between the judiciary and other branches] is drawn and when it has been crossed." (JA208, 690 F.2d at 311). While the Second Circuit is undoubtedly correct that under certain circumstances the proper placement of the dividing line between the branches may be extraordinarily difficult, such circumstances are not present here. Had the Second Circuit considered all of the well-settled principles concerning treaty interpretation and construction, rather than several isolated rules, it is submitted that it would have arrived at precisely the conclusion reached by the district court: that the Warsaw limitation of liability provisions must be enforced and that the most appropriate conversion factor for those provisions is the last official price of gold.

Instead, the Second Circuit considered only two constitutional principles: (i) that Article II, Section 2, Clause 2 of the Constitution places treaty proposal in the Executive and ratification in the United States Senate (JA207, 690 F.2d at 311); and (ii) that "it is not the province of courts to declare treaties abrogated" (JA208 n.26, 690 F.2d at 311 n.26). Having thus

correctly concluded that the power to abrogate a treaty resides in the coordinate branches of the government, the court of appeals proceeded to incorrectly conclude that Congress' repeal of the Par Value Modification Act,²² which set the official price for gold, abrogated the limitation of liability provisions of the Warsaw Convention.

In so holding, the Second Circuit totally ignored the well-settled, and clearly controlling, principle that "[a] treaty will not be deemed to have been abrogated or modified by a later statute unless such purpose on the part of Congress has been clearly expressed." *Cook v. United States*, 288 U.S. 102, 120 (1933). See *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 690 (1979); *Menominee Tribe of Indians v. United States*, 391 U.S. 404, 412-413 (1968); *Pigeon River Improvement, Slide & Boom Co. v. Charles W. Cox, Ltd.*, 291 U.S. 138, 160 (1934); *United States v. Lee Yen Tai*, 185 U.S. 213, 221-22 (1902). Had the Second Circuit not ignored this primary and long-standing principle, and its corollary that legislative silence is never sufficient to abrogate a treaty (*Weinberger v. Rossi*, 456 U.S. 25, 32 (1982)), its very own findings would have precluded a determination that the limitation of liability provisions had been abrogated. As the Second Circuit itself observed, "Congress may not have focused explicitly upon the Convention in repealing [the Par Value Modification] Act." (JA208, 690 F.2d at 311).

In fact, far from reflecting a clear congressional intent to either abandon the last official price of gold as the Warsaw medium of conversion or to abrogate the treaty, the 1976 Repeal Act and its legislative history make no reference whatsoever to the Warsaw Convention. The repeal was completely unrelated to the Convention and, as the Senate commented,

²² Par Value Modification Act of 1972, Pub. L. No. 92-268, 86 Stat. 116, amended by Par Value Modification Act of 1973, Pub. L. No. 93-110, 87 Stat. 352, 31 U.S.C. § 449 (1976), repealed by Bretton Woods Agreements Act of 1976, Pub. L. No. 94-564, § 6, 90 Stat. 2660, 2661 (the "1976 Repeal Act"). The 1976 Repeal Act did not become effective until April 1, 1978.

nothing more than a "series of technical amendments" designed to reflect changes in the international monetary system. Senate Comm. on Foreign Relations, Bretton Woods Agreements Act, S. Rep. No. 1148, 94th Cong., 2d Sess. 9 (1976), *reprinted in* 1976 U.S. Code Cong. & Ad. News 5935, 5943.

If anything, contrary to the Second Circuit's conclusion, the legislative history of the 1976 Repeal Act contemplates a continued role for the last official price of gold, particularly in the international arena. As the Senate Committee on Foreign Relations noted:

While it is the expressed intent of the IMF to move gold out of the international monetary system, there are vast numbers of legal and psychological mechanisms still in evidence in the system that will perpetuate some role for gold. (Senate Comm. on Foreign Relations, Bretton Woods Agreements Act, S. Rep. No. 1148, 94th Cong., 2d Sess. 12-13 (1976), *reprinted in* 1976 U.S. Code Cong. & Ad. News 5935, 5947).

Among the mechanisms employing the last official price of gold which are still very much in place are the conversion factors for the value of the Treasury Department's gold reserves²³ and the value of the United States' subscription obligations to the capital stock of the International Bank for Reconstruction and Development (the "World Bank"), the Inter-American Development Bank (the "IADB"), the International Development Association (the "IDA") and the Asian Development Bank (the "ADB").²⁴ Thus, the court of appeals

²³ See Division of Government Accounts & Reports, U.S. Dep't of the Treasury, Status Report of U.S. Government-Owned Gold (Apr. 30, 1983), which is reprinted in the Appendix to this brief (hereinafter referred to as "BA") at BA41.

²⁴ The World Bank, the IADB and the ADB have, for internal purposes, authorized the computation of the value of their capital stock in terms of SDRs; however, their separate articles of Agreement provide for the calculation of member nations' contributions based upon the last official price of gold. Articles of Agreement of the International Bank

was clearly incorrect in suggesting that "[t]he sole remaining use of the last official price is in determining the value of gold held in the form of gold certificates." (JA204 n.20, 690 F.2d at 309 n.20).

Moreover, Congress' silence with respect to the continued viability of the Warsaw limitation provisions at the time it repealed the Par Value Modification Act affirmatively supports the conclusion that Congress intended to leave the Warsaw limitation provisions unaffected. It must surely be assumed that Congress was aware of the requirement, under Article 39(2) of the Convention, that a signatory desiring to withdraw from the Convention must provide its treaty partners with six

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for Reconstruction and Development, *opened for signature* Dec. 27, 1945, art. II § 2(a), 60 Stat. 1440, 1441, T.I.A.S. No. 1502, 2 U.N.T.S. 134, 136; Agreement Establishing the Inter-American Development Bank, *done* Apr. 8, 1959, art. II § 2(a), 10 U.S.T. 3029, 3073, T.I.A.S. No. 4397, 389 U.N.T.S. 69, 76; Articles of Agreement of the International Development Association, *done* Jan. 26, 1960, art. II § 2(b), 11 U.S.T. 2284, 2286, T.I.A.S. No. 4607, 439 U.N.T.S. 249, 254; Agreement Establishing the Asian Development Bank, *done* Dec. 4, 1965, ch. II, art. 4 § 1, 17 U.S.T. 1418, 1422, T.I.A.S. No. 6103, 571 U.N.T.S. 123, 138. Congress continues to appropriate funds for United States payments to these institutions based upon the last official price of gold. Omnibus Budget Reconciliation Act of 1981, Title XIII, Pub. L. No. 97-35, §§ 1311 (World Bank), 1321 (IDA), 1351(a) (IADB), 1352(a) (ADB), 95 Stat. 739, 740-41, 744, codified at 22 U.S.C. §§ 286e-1h, 284o, 283z-2, 285w (Supp. V 1981).

As has been observed with respect to the World Bank:

Since April 1, 1978, . . . currencies no longer have par values in terms of gold and the preexisting basis for translating the 1944 dollar into members' currencies has ceased to exist. . . . Since April 1, 1978, the Bank has expressed the value of its capital stock on the basis of the SDR for purposes of its financial statements. *The Bank has continued and will continue to accept capital subscriptions at 1.20635 current U.S. dollars to one 1944 dollar, the value of the 1944 dollar at the last par value of the U.S. dollar* . . . (National Advisory Council on International Monetary and Financial Policies, Special Report to the President and to the Congress on the General Capital Increase of the International Bank for Reconstruction and Development, Attachment 1, at 2-3 (May 1981) (unpublished report) (emphasis added)).

months' notice of its intended withdrawal and that Congress would not knowingly ignore this express treaty obligation of the United States. See *The Federalist* No. 64, at 424 (J. Jay) (B. Wright ed. 1961). And, when the Article 39(2) requirement is considered in conjunction with the rule that Congressional silence in the face of an established practice, such as the use of the last official price of gold as the Warsaw conversion factor, may be treated as consent (*Dames & Moore v. Regan*, 453 U.S. 654, 686 (1981); *United States v. Midwest Oil Co.*, 236 U.S. 459, 474 (1915)), that silence becomes conclusive.

In addition, since the Warsaw Convention is a self-executing treaty which required no enabling legislation to effectuate it in the United States (*Indemnity Ins. Co. of North America v. Pan American Airways, Inc.*, 58 F. Supp. 338, 340 (S.D.N.Y. 1944); *Garcia v. Pan American Airways, Inc.*, 269 A.D. 287, 292, 55 N.Y.S.2d 317, 322 (2d Dep't 1945), *aff'd*, 295 N.Y. 852, 67 N.E.2d 257, *cert. denied*, 329 U.S. 741 (1946)), it is submitted that Congress could not have abrogated the Warsaw limitation provisions simply by repealing the Par Value Modification Act even had it desired to do so. The Par Value Modification Act has always been totally unrelated to the effectiveness of the Warsaw Convention and therefore its repeal is necessarily irrelevant to that treaty's continued viability. Since only an unambiguous legislative act can repeal or abrogate a treaty, the repeal of a statute unrelated to the effectiveness of a treaty can hardly result in its abolition. If this were not the case, treaties to which the United States has adhered would be subject to inadvertent abolition, a circumstance which would obviously not be in the best interests of the United States.

Yet further evidence of the Second Circuit's error is the fact that the Executive, the governmental branch directly charged with the conduct of foreign affairs, has found the court of appeals' decision to be inimical to the conduct of United States' foreign policy. Thus, the United States has stated with respect to the Second Circuit's opinion:

This decision, if allowed to stand, will have significant adverse consequences for the United States both in its

immediate application to the Warsaw Convention and in its broader implications for the treaty obligations of this country generally.²⁵ (United States Brief in support of TWA's Petition for Certiorari at 2).

In short, the absence of any legislative intent to abrogate the limitation of liability provisions in either the legislation repealing the Par Value Modification Act or in any other act of Congress, when coupled with the Executive's position that those provisions should continue to be interpreted as they have been in the past, necessarily leads to the conclusion that the Second Circuit's decision declaring the treaty unenforceable must be set aside. The correctness of this conclusion is confirmed by both the reality, noted by Benjamin Franklin long ago, that "[i]f we do not convince the world, that we are a Nation to be depended on for fidelity in Treaties; . . . our reputation, and all the strength it is capable of procuring, will be lost"²⁶ and the resulting rule of law that "'[t]he interpretation, therefore, . . . which would render a treaty null and inefficient cannot be admitted; . . . it ought to be interpreted in such a manner as that it may have its effect, and not prove vain and nugatory.'" *Geofroy v. Riggs*, 133 U.S. 258, 270 (1890) (quoting E. de Vattel, 2 *Droit des Gens* 265 (Pradier-Fodéré ed. Paris 1863)).

²⁵ The United States brief also points out that the Second Circuit's opinion has already served to irritate the international community. The Government has noted that "several foreign governments have expressed their view that the court of appeals' decision will seriously affect United States relations in international aviation." (United States Brief in support of TWA's Petition for Certiorari at 2-3).

Such expressions of disapproval by foreign governments are not surprising since no other signatory State has rejected the Convention's limitation of liability provisions. In view of that fact, the Second Circuit clearly overemphasized what it regarded as "international disarray" with respect to the conversion issue. (JA203-04, 690 F.2d at 309). The primary teaching of the various foreign cases and materials is that unless the Warsaw limitation is enforced, the expectations of the Convention's signatories will be totally defeated.

²⁶ Letter from Benjamin Franklin to Charles Thomson (May 13, 1784), 9 *The Writings of Benjamin Franklin* 212, 213 (A. Smyth ed. 1907).

Since the Warsaw Convention has not been abrogated by Congress and cannot be abrogated by the courts, the judiciary is duty bound to interpret the Convention in a manner which will lead to its enforcement and to "administer it according to its terms." *Doe ex dem. Clark v. Braden*, 57 U.S. (16 How.) 635, 657 (1854).²⁷ In carrying out that duty, the guiding principle and primary goal is to give the treaty "a fair interpretation, according to the intention of the contracting parties, . . . so as to carry out their manifest purpose." *Wright v. Henkel*, 190 U.S. 40, 57 (1903). See, e.g., *Bacardi Corp. of America v. Domenech*, 311 U.S. 150, 163 (1940); *Valentine v. United States ex rel. Neidecker*, 299 U.S. 5, 10 (1936); *Factor v. Laubenheimer*, 290 U.S. 276, 293-94 (1933); *Nielsen v. Johnson*, 279 U.S. 47, 51-52 (1929); *Tucker v. Alexandroff*, 183 U.S. 424, 437 (1902). Moreover, a change in circumstances, such as gold's metamorphosis into a volatile commodity, does not relieve the courts of their obligation to effectuate the intentions of the treaty's framers as effectively as possible in view of the unforeseen events. See *Pigeon River Improvement Slide & Boom Co. v. Charles W. Cox, Ltd.*, 291 U.S. 138

²⁷ Of course, as *Braden* observes, a treaty need not be enforced if it conflicts with the Constitution of the United States. 57 U.S. (16 How.) at 657. Although there have been several constitutional challenges to the Warsaw limitation provisions, none has ultimately succeeded. See, e.g., *In re Aircrash in Bali, Indonesia on April 22, 1974*, 684 F.2d 1301 (9th Cir. 1982); *McCarthy v. East African Airways Corp.*, 13 Av. Cas. (CCH) 17,385, 17,386 (S.D.N.Y. 1974); *Pierre v. Eastern Air Lines, Inc.*, 152 F. Supp. 486, 489 (D.N.J. 1957); *Indemnity Ins. Co. of North America v. Pan American Airways, Inc.*, 58 F. Supp. at 340. See also *Burdell v. Canadian Pacific Airlines, Ltd.*, 10 Av. Cas. (CCH) 18,151 (Ill. Cir. Ct. 1968), *opinion withdrawn*, 11 Av. Cas. (CCH) 17,351 (Ill. Cir. Ct. 1969), in which an Illinois trial court initially found the Convention unconstitutional, but subsequently withdrew its opinion on the ground that it was unnecessary to reach the question of constitutionality. Indeed, in considering the constitutionality of another limitation statute—the Price-Anderson Act, relating to the nuclear energy industry—this Court recently cited the *Pan American* case with approval and noted that "statutes limiting liability are relatively commonplace and have consistently been enforced by the courts." *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 88 n.32 (1978).

(1934). As this Court has recently observed, the judiciary's constitutionally mandated role with respect to treaties "is limited to giving effect to the intent of the Treaty parties." *Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176, 185 (1982).

When the foregoing principles of treaty interpretation are applied to the facts at bar, the last official price of gold clearly emerges as the appropriate Warsaw conversion factor.²⁸ Article 22 of the Warsaw Convention provides in relevant part as follows:

(2) In the transportation of checked baggage and of goods, the liability of the carrier shall be limited to a sum of 250 francs per kilogram

(4) The sums mentioned above shall be deemed to refer to the French franc consisting of 65½ milligrams of gold at the standard of fineness of nine hundred thousandths. These sums may be converted into any national currency in round figures.

Thus, under Article 22, the maximum extent of a carrier's liability is expressed for conversion purposes in terms of a

²⁸ Significantly, numerous foreign decisions have reached precisely this conclusion, finding the last official price of gold to be the appropriate conversion factor. See, e.g., *Costell v. Iberia, Lineas Aéreas de España, S.A.*, No. 255 (Court of Appeal of Valencia, Spain Oct. 16, 1981) (an English translation is set forth at BA6); *Pakistan International Airlines v. Compagnie Air Inter S.A.*, No. 79/2278 (Court of Appeal of Aix-en-Provence, France Oct. 30, 1980) (an English translation is set forth at JA133); *Hornlinie A.G. v. Société Nationale Pétrole Aquitaine*, 1972 Nederlandse Jurisprudentie No. 269, at 728 (Supreme Court of The Netherlands Apr. 14, 1972), reprinted in 7 Eur. Trans. L. 933 (1972) (an English translation is set forth at JA114). See also *Companhia de Seguros Marítimos v. Varig* (Federal Court of Appeals, Brazil June 3, 1975), and *Association Aéronautique v. Thiérache* (Trib. gr. inst., Paris, France Feb. 10, 1973), original text reprinted in [1973] 27 Revue Française de Droit Aérien 212, which are discussed in C. Shawcross & M. Beaumont, *Air Law* § 452A, at 142 (4th ed. 1977 "Noter-up" Issue 10 1982). Since the decisions of "our sister signatories [are] entitled to considerable weight" (*Benjamins v. British European Airways*, 572 F.2d 913, 919 (2d Cir. 1978), cert. denied, 439 U.S. 1114 (1979)), these cases are of particular importance.

specified weight of gold. As demonstrated above (*see supra* pp. 5-8), gold was selected in 1929 because it was the then existing international unit of account which would provide stable and predictable limits of liability, and for many years gold served its Warsaw purpose admirably. (JA24; *see graph at* JA30). However, since 1978, gold has no longer been an international unit of account but only

a volatile commodity, not related to a price index, or to the rate of inflation, or indeed to any meaningful economic measure, other than the views of whoever made up the market about all of the terrible things going on in the unpredictable world. (A. Lowenfeld, *Aviation Law* § 6.51, at 7-169 (2d. ed. 1981))

As a result of this change in the nature of the international use of gold, basing the Warsaw limitation on the market price of gold would lead to a widely fluctuating limit of liability which would vary substantially from week to week or even day to day.²⁹ For example, during the short interval between January 5, 1981 and January 29, 1981, the market price of gold fell from approximately \$600 to \$493.75 per ounce (JA24), a fluctuation of 18 percent.³⁰ Consequently, employing the market price of gold as a conversion factor would totally undermine the stable and foreseeable limits of liability which the drafters of the Convention sought to achieve. *See supra* pp. 5-8.

²⁹ As a general rule, the conversion of foreign currency into a United States judgment is calculated as of the date of judgment. *See Deutsche Bank Filiale Nurnberg v. Humphrey*, 272 U.S. 517, 519 (1926). However, it should be noted that, at least in New York, state courts have also used the date on which the cause of action arose in making such conversions. *See Hoppe v. Russo-Asiatic Bank*, 235 N.Y. 37, 39, 138 N.E. 497, 498 (1923).

³⁰ Other illustrations of the volatile nature of the market price of gold abound: the price of gold fell from approximately \$850 per ounce in January 1980 to approximately \$490 per ounce in April of that year and then rose again to approximately \$700 per ounce in September 1980. (JA24). The wide fluctuations of the market price of gold over a one-year period are graphically depicted at JA29.

This conclusion has been concurred in by the district court in the instant case and in recent decisions of various federal and state courts. See, e.g., *Maschinenfabrik Kern, A.G. v. Northwest Airlines, Inc.*, 562 F. Supp. 232 (N.D. Ill. 1983); *In re Air Crash Disaster at Warsaw, Poland on March 14, 1980*, 535 F. Supp. 833 (E.D.N.Y. 1982), *aff'd on other grounds*, 705 F.2d 85 (2d Cir. 1983), *petition for cert. docketed*, No. 83-5 (July 11, 1983) (the "*Polish Case*"); *Deere & Co. v. Deutsche Lufthansa A.G.*, No. 81 C 4726 (N.D. Ill. Dec. 30, 1982); *Electronic Memories & Magnetics Corp. v. The Flying Tiger Line, Inc.*, No. 784512 (Cal. Super. Ct., San Francisco Aug. 25, 1982).³¹ For example, in the *Polish Case*, the district court, undoubtedly mindful of this Court's admonition that the touchstone of treaty interpretation is to effectuate the treaty's purposes (*Wright v. Henkel*, 190 U.S. at 57; *Bacardi Corp. v. Domenech*, 311 U.S. at 163), held:

The signatories of the treaties looked to gold to avoid fluctuations in the limitations, since gold had a constant value and the currencies of the various nations were subject to unilateral alterations for reasons wholly unrelated to air carriers' liability. This constancy and stability, upon which the parties to the treaties relied, cannot be achieved if the fair market value of gold is used for the calculations. To substitute the fluctuating price of the commodity gold for the relatively fixed and certain price of an international monetary unit does, as defendant suggests, directly contravene the intentions of all those who adopted the treaties. For this reason, such a substitution is clearly inappropriate, and plaintiffs' suggestion that the fair market value of gold be the basis for the conversion must be rejected. (*Polish Case*, 535 F. Supp. at 842-43) (footnote omitted).³²

³¹ The opinions in *Deere* and *Electronic Memories* are set forth in the Appendix to TWA's petition for certiorari at A-61 and A-60, respectively.

³² Numerous experts in both aviation law and the international monetary system, as well as the leading international aviation organization

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Since it is clear that deference to the intentions of the framers of Article 22 requires the rejection of the widely fluctuating market price of gold as a medium of conversion, another medium, which will effectuate those intentions, must necessarily be applied.

In light of the fundamental tenets of treaty construction, set forth above, including the rule that treaties must be construed "to give a sensible meaning to all their provisions" (*Geofroy v. Riggs*, 133 U.S. at 270), it is respectfully submitted that the district court was entirely correct in holding that conversion of the Warsaw gold provisions "should be premised on the last official price of gold in the United States." (JA189, 525 F. Supp. at 1289). Indeed, when all of the legal and factual

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affiliated with the United Nations, are in complete agreement with the *Polish Case's* condemnation of the use of the market price of gold. See, e.g., G. Miller, *Liability in International Air Transport* 178-80 (1977); Legal Committee of the International Civil Aviation Organization (the "ICAO"), Resolution Concerning the Conversion of Poincaré Francs to National Currencies in the Warsaw and Rome Conventions, 21st Sess., Minutes 84, ICAO Doc. 9131-LC/173-1, at 2 (1974) (the full text of the ICAO resolution is set forth at JA58).

There is presently scant support in the international community for the use of the market price. With one exception, all of the foreign cases employing the market price of gold as the conversion factor, upon which Franklin Mint relied in the court below, predate the dramatic fluctuations in the market price of gold which began in 1979. See, e.g., *Kuwait Airways Corp. v. Sanghi*, No. 54/77 (Court of the Principal Civil Judge, Civil Station Bangalore, India Aug. 11, 1978) (JA179); *Balkan Bulgarian Airlines v. Tammaro* (Court of Milan, Italy Oct. 25, 1976) (JA176); *Florencia, Cia. Argentina de Seguros S.A. v. Varig S.A.* (Federal Civil & Commercial Court, Buenos Aires, Argentina Aug. 27, 1976), original text reprinted in 1977 Uniform L. Rev. 198 (JA169); *Zakoupolos v. Olympic Airways Corp.*, No. 256/74 (Court of Appeal, 3d Dep't, Athens, Greece Jan. 10, 1974) (JA165). The one foreign case upon which Franklin Mint relied, which was decided after that date, *Cosida S.p.A. di Assicurazioni e Riassicurazioni v. B.E.A.*, No. 2796/77 (Milan Court of Appeal, Italy, Judgment No. 861 June 9, 1981), has been overruled by statute. See Law No. 84 of March 26, 1983, 90 *Gazzetta Ufficiale della Repubblica Italiana* (Apr. 1, 1983) (BA37), pursuant to which Italy adopted SDRs as the Warsaw conversion factor.

aspects of the question are considered, it is undeniable that—in the words of the *Polish Case*—the use of the last official price of gold makes “the most sense.” (*Polish Case*, 535 F. Supp. at 842).

A conversion predicated on the last official price clearly results in a stable and predictable limit of liability which completely conforms to the purposes envisioned by the framers of Article 22. As the district court obviously recognized and the *Polish Case* court explicitly held:

The clear merit of using this price as the unit for conversion is that the price constitutes a conversion factor established by precisely the kind of mechanism that the Convention's drafters contemplated when the applicable clauses were drafted. (*Polish Case*, 535 F. Supp. at 843).

Significantly, at least two Federal district courts which have considered the question subsequent to the Second Circuit's decision herein, have rejected that decision and have employed the last official price of gold as the conversion factor. See *Maschinenfabrik Kern, A.G. v. Northwest Airlines, Inc.*, 562 F. Supp. at 239; *Deere & Co. v. Deutsche Lufthansa A.G.*, No. 81 C 4726 (N.D. Ill. Dec. 30, 1982).³³

³³ One United States District Court has adopted the Second Circuit's *Franklin Mint* reasoning as well as its decision. However, that court did not limit its ruling to prospective application. *In re Aircrash at Kimpo International Airport, Korea on November 18, 1980*, 558 F. Supp. 72 (C.D. Cal. 1983), *interlocutory review denied*, No. 83-8051 (9th Cir. May 10, 1983). *Kimpo* appears to be the only court decision, in any country, which follows *Franklin Mint* and abrogates the limitation of liability provisions. The fact that no foreign court has taken this step is of particular importance since, as Lord Denning, M.R., observed with respect to the Warsaw Convention in *Corocraft Ltd. v. Pan American Airways Inc.*, [1969] 1 Q.B. 616, 655 (1968): “The courts of all the countries should interpret this Convention in the same way.”

In addition, one district court has found the market price of gold to be the appropriate conversion factor. *Boehringer Mannheim Diagnostics, Inc. v. Pan American World Airways, Inc.*, 531 F. Supp. 344 (S.D.

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As the *Maschinenfabrik* court held:

To conclude as the Second Circuit did in *Franklin Mint* that the action of Congress in eliminating an official price of gold should operate to eliminate all limitations of liability found in the Warsaw Convention reads too much into an unrelated act of Congress. That act was intended to deal with various monetary matters and only incidentally affected the provisions of the Warsaw treaty. There is no reason to believe that Congress intended to declare Article 22 obsolete.

Rather, this Court believes it should enforce . . . the last official price of gold in the United States as the basis for conversion and liability limitation. (562 F. Supp. at 239).³⁴

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Tex. 1981), appeal docketed, No. 81-2519 (5th Cir. Dec. 30, 1981). Not surprisingly, *Boehringer* has been severely criticized:

[*Boehringer*] concluded that the proper basis for determining the liability limitation is with reference to the free market price of gold. . . . It did so in spite of its findings that the drafters of the Warsaw Convention used gold as the unit of reference because of its stability and that "to the present day . . . the free-market price of gold has risen to more than \$400 an ounce . . ." I must respectfully disagree with the Texas court's conclusion . . . (*Polish Case*, 535 F. Supp. at 843 n.8).

Boehringer is presently on appeal to the United States Court of Appeals for the Fifth Circuit, and has been argued on the merits. However, the Fifth Circuit has indicated that it will withhold its decision pending this Court's determination herein. See Letter from Chief Deputy Clerk, Fifth Circuit, to counsel (March 4, 1983).

³⁴ Although not explicitly stated, it can be assumed that the district courts which have rejected the Second Circuit's decision were concerned with the possibility that if the United States were the only Warsaw signatory imposing no limit of liability, substantial forum shopping and additional overcrowding of the already overburdened federal courts could result. Thus, those district courts apparently hoped to avoid the extraordinary increase in litigation which has already taken place in maritime cargo cases—e.g., thirty percent of the present civil docket of the Southern District of New York (see A

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Additionally, as the district court observed, the use of the last official price of gold is also mandated by CAB Order 74-1-16. That Order requires United States airlines to file tariffs advising the public that the limit of liability of 250 francs per kilogram for checked baggage and goods is \$20.00 or stated on a per pound basis is \$9.07. (JA57). This limitation is calculated on a gold value of \$42.22 per ounce, the last official price of gold in the United States.

Although the Second Circuit has suggested that "[t]he sole criterion supporting the CAB's position appears to be the law of inertia" (JA205, 690 F.2d at 310), the fact remains that in the absence of any countervailing official guidance, the entire United States airline industry is required to conform its conduct to Order 74-1-16 and has consistently done so. The CAB is aware of this industry-wide practice and has obviously not objected to compliance with its own Order.³⁵

Contrary to the Second Circuit's assertion that CAB Order 74-1-16 continues to exist solely by virtue of "inertia," affirmative policy reasons have led to the continued existence of Order 74-1-16:

This approach produces the greatest degree of stability possible

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Proposal for a Pilot Program Concerning Cargo Damage Cases, 37 Rec. A.B. City N.Y. 103, at 103 (1982))—which in large measure has arisen from the fact that the Carriage of Goods by Sea Act of 1936, § 4(5), 46 U.S.C. § 1304(5) (1976), provides for a higher limit of liability than the related Convention for the Unification of Certain Rules Relating to Bills of Lading for the Carriage of Goods by Sea, *opened for signature* Aug. 25, 1924, art. 4, § 5, 51 Stat. 233, 252, T.S. No. 931, 120 L.N.T.S. 155, 167, as interpreted by the English Courts. See *Asser*, *supra* note 11, at 648.

³⁵ As a consequence of this CAB mandated industry-wide practice, of which Franklin Mint as an experienced shipper was undoubtedly aware, the district court found that the parties had intended "to adopt the last official price of gold as the basis for converting the Article 22 limitation into dollars in the instant case." (JA188-89, 525 F. Supp. at 1289).

We believe that the Board's current course of action [employing the last official price of gold] is superior to any of the alternatives currently available. (Golden Memorandum, *supra* p. 5, at JA40).³⁶

In view of the blackletter law that an agency regulation must be affirmed unless it is arbitrary, capricious, or an abuse of discretion (*see* Administrative Procedure Act § 10(e), 5 U.S.C. § 706(2)(A) (1976)); that agency action is entitled to a presumption of validity (*see, e.g., Permian Basin Area Rate Cases*, 390 U.S. 747, 767 (1968); *Ethyl Corp. v. Environmental Protection Agency*, 541 F.2d 1, 34 (D.C. Cir.) (en banc), *cert. denied*, 426 U.S. 941 (1976)); and that "a reviewing court . . . 'is not empowered to substitute its judgment for that of the agency'" (*Federal Communications Commission v. WNCN Listeners Guild*, 450 U.S. 582, 594 n.30 (1981)), particularly with respect to the enforcement of existing treaty provisions (*Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. at 184-85; *Kolovrat v. Oregon*, 366 U.S. 187, 194 (1961)), it is submitted that the district court's reliance upon CAB Order 74-1-16 was entirely justified. Even absent the other bases of its holding, that Order alone would have been more than adequate support for the district court's decision.

In sum, the use of the last official price of gold as a conversion factor is totally consistent with the objectives and purposes of Article 22; with the only presently effective CAB regulation dealing with this issue; and with the overwhelming weight of authority in both the United States and other signatory jurisdictions. It should therefore be adopted as the Warsaw conversion factor.

³⁶ The CAB has effectively endorsed the Golden Memorandum and the continued use of the last official price of gold as a conversion medium. This is so because all United States air carriers are required to file their international tariffs with the CAB (*see* Federal Aviation Act of 1958, § 403(a), 49 U.S.C. § 1373(a) (1976)), and they have continued to file using the last official price of gold. "Moreover, the Board's interpretation is consistent with the industry's own understanding" of the Convention, a fact which further supports the CAB's position. *British Caledonian Airways, Ltd. v. Civil Aeronautics Board*, 584 F.2d 982, 996 (D.C. Cir. 1978).

POINT II

SPECIAL DRAWING RIGHTS ARE AN ALTERNATIVE
CONVERSION FACTOR

Although the district court found the last official price of gold to be the most appropriate conversion factor for the Article 22 gold provisions, it noted that were it "writing on a clean slate," it would have found the arguments in favor of employing SDRs to be "most persuasive." (JA188, 525 F. Supp. at 1289).

As indicated above and amplified by the record, SDRs are a stable international unit of account which were clearly intended to replace gold as an international reference value in the world economy. (JA21-22). In fact, SDRs are frequently referred to as "paper gold." P. Samuelson, *Economics*, *supra* p. 10, at 612. Therefore, their use as a medium of conversion under Article 22 would result in predictable and stable limits of liability which would fully effectuate the Convention's purposes.

SDRs were adopted in the Montreal Protocols at the suggestion of the United States. See A. Lowenfeld, *Aviation Law* § 6.51, at 7-171 (2d ed. 1981). Consequently, it would clearly be appropriate to implement their use via judicial determination, since "[t]he conduct of the parties subsequent to ratification of a treaty may . . . be relevant in ascertaining the proper construction to accord the treaty's various provisions." *Day v. Trans World Airlines, Inc.*, 528 F.2d at 35. See *Pigeon River Improvement, Slide & Boom Co. v. Charles W. Cox, Ltd.*, 291 U.S. 138, 158 (1934).³⁷

³⁷ Article 18 of the Vienna Convention on the Law of Treaties, opened for signature May 23, 1969, reprinted in 8 Int'l Legal Materials 679, 686 (1969), also supports the use of SDRs. Under that Article, by signing the Montreal Protocols the United States placed itself under an obligation to avoid undermining them during the ratification process. See generally, *United States v. D'Auerville*, 51 U.S. 609, 623 (1850). As discussed above, see *supra* p. 11, while the Protocols did not receive

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Moreover, although ignored by the Second Circuit, the very statute which repealed the Par Value Modification Act accepted SDRs as a unit of account for determining the United States' obligations as a member of the IMF (Second Amendment to the IMF Articles of Agreement, *supra* p. 9, art. IV, § 2(b), 29 U.S.T. at 2208-09, T.I.A.S. No. 8937) with the objective of making the SDR "the principal reserve asset in the international monetary system" (Second Amendment to the IMF Articles of Agreement, *supra* p. 9, art. VIII, § 7, 29 U.S.T. at 2226, T.I.A.S. No. 8937). Thus, if, as the court of appeals suggested, the 1976 Repeal Act is accepted as having terminated the use of the last official price of gold as the Warsaw conversion factor, it necessarily follows that Congress must have intended to substitute SDRs in its place.

The propriety of selecting SDRs as the conversion factor is supported by numerous reasons:

the ease with which the SDR can be adopted by interpretation or administrative decision, the adoption of the SDR under treaties that deal with a similar subject matter, the desirability of a unit of account that will ensure equal

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the necessary two-thirds majority in the Senate in March 1983, they are being reconsidered and are still supported by the Administration. 129 Cong. Rec. S2279 (daily ed. Mar. 8, 1983).

Although the Vienna Convention has not been ratified by the United States, it is "generally recognized as the authoritative guide to current treaty law and practice" (Letter of Submittal from Secretary of State William P. Rogers to the President, S. Exec. Doc. L., 92d Cong., 1st Sess. 1 (Oct. 18, 1971) (submitting the Vienna Convention)). As such, it has been relied upon by United States courts. *See, e.g., Weinberger v. Rossi*, 456 U.S. at 29 n.5; *Greater Tampa Chamber of Commerce v. Goldschmidt*, 627 F.2d 258, 263 n.4 (D.C. Cir. 1980); *Husserl v. Swiss Air Transport Co., Ltd.*, 351 F. Supp. 702, 707 n.6 (S.D.N.Y. 1972), *aff'd per curiam*, 485 F.2d 1240 (2d Cir. 1973).

Use of the last official price of gold as the Warsaw conversion factor would be as fully consistent with the Vienna Convention as use of SDRs, since the last official price achieves the predictable and stable limits of liability sought by the Montreal Protocols.

value wherever a recovery of damages pursuant to the treaty is sought and whatever the currency in which damages are awarded, [and] the publication by the [IMF] of exchange rates in terms of the SDR and the difficulty or cost of establishing a substitute procedure. (J. Gold, *Floating Currencies, SDRs, and Gold*, IMF Pamphlet Series No. 22, at 65 (1977)).³⁸

Thus, SDRs would fully comply with the intent of the framers of Article 22 since they would result in a stable and predictable limitation of liability. In fact, it was just such reasoning which led the highest foreign court to directly confront the issue to select SDRs.

In *State of The Netherlands v. Giants Shipping Corp.*, Rechtspraak van de Week 321 (May 30, 1981) (Supreme Court of The Netherlands May 1, 1981) (JA72) (hereinafter "*Giants Shipping*"), the Supreme Court of The Netherlands, that nation's highest tribunal, was faced with precisely the issue before this Court: how to convert the gold value provisions of a multilateral treaty's limitation of liability clause into national currency, in view of gold's changing role in the world

³⁸ SDRs have been adopted as the basis for converting Warsaw gold francs into national currencies by legislation or administrative acts in a number of foreign countries, including Canada (Currency and Exchange Act: Carriage By Air Act Gold Franc Conversion Regulations, Jan. 13, 1983, 117 Can. Gaz., pt. II, No. 2, at 431 (Jan. 26, 1983)) (BA36); Italy (Law No. 84 of March 26, 1983, 90 Gazzetta Ufficiale della Repubblica Italiana (Apr. 1, 1983)) (BA37); the Republic of South Africa (Carriage by Air Act, No. 17 of 1946, § 3(7), as amended by No. 5 of 1964 and No. 81 of 1979, Stat. S. Afr. (Issue No. 13) 15, implemented by Dep't of Transport Notice R2031 (Sept. 14, 1979)) (BA39); Sweden (Carrier by Air Act (1957: 297), ch. 9, § 22, (as amended Mar. 30, 1978)) (JA67); and the United Kingdom (Stat. Inst. 1980 No. 281) (JA70).

It is noteworthy that the applicable Swedish legislation nullified an earlier decision by a Swedish court in *Saga v. Sagoland* (Lower Court, Göteborg, Sweden Oct. 2, 1973), discussed in [1975] 29 Revue Française de Droit Aérien 138, which applied the market price of gold, and that the applicable Italian legislation codified a ruling of the Rome Civil Court in *Linee Aeree Italiane v. Riccioli*, No. 609/79 (Nov. 14, 1978) (JA97).

economy.³⁹ In answering that question, the court noted that "[t]he point of departure should be the preference—underlying the Treaty . . .—for a standard which is current in the international monetary field for determining the internationally uniform limits of liability intended by the Treaty." (*Giants Shipping*, *supra* p. 32, at JA92-93). Finding that the market price of gold "would be contrary to this point of departure" (JA93) because "gold has lost all monetary significance" (JA92), the court instead chose SDRs, notwithstanding the fact that an amendment to the treaty, substituting SDRs for French gold francs, was not yet in force. The rationale for the court's decision was the fact that SDRs had replaced gold as the unit of account in the international monetary system and that, therefore, their use was in harmony with "the adjustment of international treaties and national laws to the changed monetary situation." (*Giants Shipping*, *supra* p. 32, at JA93-94).

In making the actual conversion from gold francs to SDRs, the *Giants Shipping* court performed a simple calculation. Using the gold value of SDRs as of April 1, 1978, the date on which the IMF method of valuing SDRs was severed from gold, the court concluded that 15 French gold francs had the same value as 1 SDR. Therefore, by dividing the number of French gold francs called for by the limitation provisions of the Convention by 15, it reached the proper number of SDRs. Once the number of SDRs was obtained, the limit of liability

³⁹ In *Giants Shipping*, the court construed a limitation of liability provision set forth in the Convention Relating to the Limitation of the Liability of Owners of Sea-Going Ships, done at Brussels Oct. 10, 1957 (the "Brussels Convention"), reprinted in 6 *Benedict on Admiralty* 5-11 (7th ed. 1983). The Brussels Convention is strikingly similar to the Warsaw Convention in many respects: the limitation of liability provisions of each Convention contain gold clauses expressed in French gold francs; among the fundamental purposes of both Conventions was the desire to create uniform rules governing the liability of carriers engaged in international transportation; and the signatories of each Convention had agreed to amendments adopting SDRs in place of gold, although neither amendment was yet in force.

was converted into local currency on the date of payment simply by referring to the Guilder/SDR exchange rate posted by the IMF.

In addition to the Supreme Court of the Netherlands, the courts of several other Warsaw signatory States have employed SDRs.⁴⁰ See, e.g., *Linee Aeree Italiane v. Riccioli*, No. 609/79 (Rome Civil Court, Italy Nov. 14, 1978) (JA102);⁴¹ *Kislinger v. Austrian Airtransport*, No. 1 R 145/83 (Commercial Court of Appeals of Vienna, Austria June 21, 1983) (BA20); *Rendez-vous-Boutique-Parfumerie Friedrich und Albine Breitingher GmbH v. Austrian Airlines*, No. 14 R 11/83 (Court of Appeals of Linz, Austria June 17, 1983) (BA25, 30).

In short, the Warsaw gold provisions can easily be converted into U.S. (or any other) currency via SDRs. On March 31, 1978, SDRs were valued in terms of gold and were therefore easily convertible into gold francs. On April 1, 1978, the IMF member nations severed the link between gold and the SDR, as well as between gold and their national currencies, and SDRs were valued according to a weighted basket of national currencies. Although the value of the SDR has varied somewhat with change in the value of the basket of currencies, on one day, April 1, 1978, the basket value of the SDR was precisely the

40 The only other Supreme Court of a signatory State to consider the Warsaw conversion issue, the Cour de Cassation of France, has held that the limitation must be enforced and that the conversion factor to be applied should be that which is considered correct by the executive branch of the French government. In so holding, the Court remanded the case to the Court of Appeals of Paris, which had applied the modern French franc as the conversion factor, for further proceedings not inconsistent with its opinion. *Chamie v. Egyptair*, No. 80-12.428 (Cass. civ. com., France Mar. 7, 1983) (BA2).

41 Prior to rendering its decision, the *Riccioli* court sought advice concerning the proper basis for conversion from an official of the Italian Central Exchange Control Board with expertise in the field of international monetary affairs. (An English translation of that official's technical report is set forth at JA106). As noted above, see *supra* p. 32 n. 38, subsequent to the *Riccioli* decision, Italy adopted SDRs as the conversion factor by legislation.

same as its gold value had been the day before. As a result, the SDR, having both a gold value and a modern currency value, may be employed as a Rosetta stone to translate the Warsaw gold provisions into current U.S. dollars with an unbroken line of value from gold to SDRs to national currencies.⁴²

Notwithstanding the foregoing arguments, the Second Circuit rejected SDRs as a conversion factor primarily because they are "a creature of an international body, the IMF" (JA207, 690 F.2d at 310), and because their value can change "at the whim of an international body distinct from the parties to the Convention." (JA207, 690 F.2d at 311). It is submitted that those reasons are parochial and entirely without merit.

The Second Circuit failed to pay due consideration to the fact that the United States ratified the multilateral treaty creating the IMF (*see supra* p. 8 n.15); took the lead in suggesting the adoption of SDRs as the Montreal Protocols'

⁴² The mathematical computation converting French gold francs into U.S. dollars would be as follows. The value of the SDR on March 23, 1979, the date the cargo was delivered to TWA, has been used for illustrative purposes.

1 Poincaré franc (90% fine gold)	=	0.0655 gram of fine gold
1 Poincaré franc (100% fine gold)	=	0.05895 gram of fine gold
1 SDR (gold value on March 31, 1978)	=	0.888671 gram of fine gold
The number of francs in one SDR	= $\frac{0.888671}{0.05895}$	= 15.075 rounded to 15
The Warsaw limit of 250 francs per kilogram converted to SDRs	$\frac{250}{15}$	= 16.67 SDRs per kilogram, rounded to 17 SDRs
Dollar value of 1 SDR on March 23, 1979	=	1.28626
17 SDRs per kilogram \times 1.28626	=	\$21.87 per kilogram.

unit of conversion (*see supra* p. 11); and has accepted SDRs as the international unit of account vis-à-vis the IMF Treaty as amended (*see supra* p. 31). Moreover, a seventy percent majority of the total voting power of the 146 member nations is necessary to make even a technical change to the valuation of the SDR and an eighty-five percent majority is necessary to make a fundamental change in valuation. Second Amendment to the IMF Articles of Agreement, *supra* p. 9, art. XV, § 2, 29 U.S.T. at 2238, T.I.A.S. No. 8937. Thus, while SDRs may be a "creature of an international body," they are also a "creature" of the United States and can hardly be revalued upon a "whim."

The Second Circuit's additional reasons for rejecting SDRs are equally unavailing. (JA206-07, 690 F.2d at 310). While the Second Circuit is correct that SDRs are not mentioned in the Convention, that fact alone is insufficient to prevent their use as a conversion factor since SDRs, as the modern day international unit of account, totally fulfill the intent of the treaty's drafters. In the words of Mr. Justice Holmes concerning Constitutional construction, which are equally applicable to treaty interpretation:

[W]hen we are dealing with words that also are a constituent act . . . we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. (*Missouri v. Holland*, 252 U.S. 416, 433 (1920)).

Therefore, the language of a treaty should never be permitted to become a "verbal prison" (*Eck v. United Arab Airlines, Inc.*, 360 F.2d 804, 812 (2d Cir. 1966)); nor should a change in circumstances be permitted to defeat the treaty's original purposes "even if this requires departing in some measure from the letter [of the treaty provision] and reading the language in a practical rather than literal fashion" (*Eck v. United Arab Airlines, Inc.*, 360 F.2d at 812). *See Maignie v. Compagnie Nationale Air France*, 549 F.2d 1256, 1261 n.10 (9th Cir.), *cert. denied*, 431 U.S. 974 (1977); J. Sutherland, *Statutes and*

Statutory Construction § 32.09, at 383 (4th ed. 1972). As a result, the mere fact that SDRs are not mentioned in the Convention is insufficient to preclude their use as the conversion factor.

The Second Circuit's suggestion that had it employed SDRs it would have had to select, as a policy matter, the actual limitation is simply wrong. Far from having to set the limit, a United States court could employ SDRs as the conversion factor following the *Giants Shipping* method. As discussed above, that method relies upon the gold value of SDRs on April 1, 1978 and, therefore, is directly tied to the Warsaw gold provisions.

Finally, the Second Circuit's observation that the Senate has thus far declined to ratify the Montreal Protocols (JA206, 690 F.2d at 310) is completely irrelevant. The fact remains that SDRs have been accepted by the United States as the modern international unit of account (*see supra* p. 31) and, as such, are in no way undercut by the continued pendency of the Montreal Protocols.

In sum, the Second Circuit's rejection of SDRs as the Warsaw conversion unit is entirely without merit. SDRs have taken the place of gold in the international economic system; the Warsaw signatories have indicated in the Montreal Protocols that SDRs should take the place of gold in Article 22 of the Convention; and the recent trend among signatory states has, in fact, been to adopt SDRs through administrative orders (*see supra* note 38), legislation (*id.*) or judicial interpretation (*see supra* pp. 33-34).⁴³ Therefore, if the last official price of gold is not adopted as the conversion factor for the Warsaw gold provisions, it is respectfully submitted that SDRs are the proper alternative.

⁴³ This recent worldwide trend toward the use of SDRs as the Warsaw conversion factor is of particular importance since uniformity of interpretation and result was a principal goal of the drafters. "A multilateral treaty is rather like a 'uniform law' within the United States. The Court has an obligation to keep interpretation as uniform as possible." *Block v. Compagnie Nationale Air France*, 386 F.2d at 337-38.

CONCLUSION

For all the foregoing reasons the Judgment of the United States Court of Appeals for the Second Circuit should be modified insofar as it holds the limitation of liability provisions of the Warsaw Convention prospectively unenforceable; the last official price of gold or, in the alternative, SDRs should be designated as the conversion factor for the Warsaw Convention's limitation of liability provisions.

Dated: New York, New York
August 29, 1983

Respectfully submitted,

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CHAMIE V. EGYPTAIR,

No. 80-12.428, Cass. Civ. Com.,

France (Mar. 7, 1983)

TRANSLATION

COMM.

COUR DE CASSATION

(Supreme Court of Appeals)

Public Trial of March 7, 1983

Highest Appeal

Justice SAUVAGEOT, Presiding

Decree No. 231

Index No. 80-12.428

of April 29, 1980

FRENCH REPUBLIC

IN THE NAME OF THE FRENCH PEOPLE

THE SUPREME COURT OF APPEALS, COMMERCIAL DIVISION,
has handed down the following decree:

On the appeal filed by the Compagnie Nationale Egyptienne de Transports Aériens—Egyptair—a corporation located in Hélio-
polis, Cairo, Egypt, represented by its current President/
General Manager AIDAROS, with branch offices at 1 bis, rue
Auber, Paris 9, represented by its Chairman of the Board of
Directors, EL MELEHY,

appealing a decree issued on January 31, 1980, by the Court of
Appeals of Paris, in favor of Ms. Luica Jafalian Chamie,
residing at 30 allée Zamenoff, Valence, Drôme,

respondent in the appeal.

In support of its appeal the plaintiff cites three grounds for
appeal, the third of which reads as follows:

"The appeal objects to the decree being appealed in that said decree orders an airline to pay 12,500 francs for the loss of 50 kilograms of checked baggage, with interest from the date of the complaint at the statutory rate, on the grounds that the judge may not refuse to rule on the grounds that the law is silent, obscure, or inadequate; whereas since April 1, 1978, the disappearance of the official franc-gold parity makes it impossible to apply the rule of conversion of account units into national currency; whereas the present French franc may only be used to convert into the national currency the francs of the Warsaw Convention, and must be recognized as having a value equivalent to the 1926 French franc on the international level, but without reference to gold; (1) Whereas the judge may not substitute for the parties to an International Convention by replacing a clause he declares inapplicable with a new and completely different provision; whereas in ruling as it did the Appeals Court violated Article 4 of the Civil Code through incorrect application; (2) Whereas assuming as inapplicable the clause referring to the gold franc for the limitation of liability of the air carrier, this inapplicable clause cannot render null and void the agreed limitation of liability which thereupon can be cited against the passenger; whereas in ruling as it did, the Appeals Court violated Article 23 of the Warsaw Convention through incorrect application."

Whereupon, THE COURT, at public trial held on this date,

Considering the Report of Counsellor Jonquères, the comments of Boré, Capron, and Xavier, P.C., attorneys for the Compagnie Nationale Egyptienne de Transport Aériens, the observations of Mr. Boullez, attorney for Ms. Chamie, the pleadings of Mr. Cochard, Attorney General, and due deliberation having been had pursuant to law;

Concerning the third grounds of the appeal, part one thereof:

In consideration of Article 22 of the Warsaw Convention of October 12, 1929;

Whereas, according to the decree being appealed, on August 26, 1976, Ms. Chamie travelled from Damascus to Paris, via Cairo, on a flight provided by the Compagnie Nationale Egyptienne de Transport Aériens (Egyptair); whereas during this trip three suitcases belonging to said passenger, and having a total weight of 50 kilograms, were lost; whereas said passenger, who had not submitted a declaration of value upon departure, cited the provisions of Articles 22-2 and 22-4 of the Warsaw Convention of October 12, 1929, and filed a claim for an indemnity computed in accordance with the price of gold on the Paris free market; whereas Egyptair, upon being served with the demand for payment of this indemnity, challenged Ms. Chamie's interpretation of this international convention and, finding this demand unwarranted, offered her an indemnity of 4,900 francs;

Whereas, after finding that the method of computing the loss-of-baggage indemnity specified in Article 22-4 of the Warsaw Convention and referred to in the transportation contract binding the parties was not applicable in this action, the Court of Appeals, stating that the judge may not refuse to render judgment on the pretext of silence, obscurity, or inadequacy of the law, ruled that the indemnity owed by Egyptair to Ms. Chamie was to be evaluated by taking into consideration only the value of her baggage in French national currency on the date of the judgment, and, because of the indemnity ceiling, the court fixed said indemnity at 12,500 francs;

Whereas, in imposing upon the parties a method of computation different from the one provided for in the Warsaw Convention, notwithstanding the fact that when the provisions of a diplomatic treaty submitted to their interpretation involve the public monetary order as per the international agreements in effect, judges ruling on the merits must request the official interpretation thereof given by the government agency and shall conform to it, the Court of Appeals violated the provision hereinabove mentioned;

NOW THEREFORE, and without any necessity to rule on the other grounds of the appeal,

RESCINDS AND VACATES the decree handed down on January 31, 1980, by the Court of Appeals of Paris; consequently, restores the action and the parties to the same and similar condition in which they were prior to said decree, and in order to render them justice returns them to the Court of Appeals of Paris, composed of other judges appointed for that purpose by special ruling in Counsel Chambers;

Orders defendant to pay to plaintiff the sum of twenty francs eighty-five centimes by way of expenses, not including the cost of serving this decree;

Orders the Public Prosecutor attached to the Supreme Court of Appeals to have this decree printed and transmitted for recording in the records of the Court of Appeals of Paris, in the margin or at the end of the vacated decree;

So ordered, adjudged, and decreed by the Supreme Court of Appeals, Commercial Division, at public trial on March seventh one thousand nine eighty-three;

Present: Justice Sauvageot, Presiding; Justice Jonquères, rapporteur; Justices Perdriau, Gigault de Crisenoy, Fautz, Bargain, Delmas-Goyon, Bonnefous, Defontaine, Hatoux, Dupré de Pomarède, Le Tallec; Desgranges and Dupieux, referendary Justices; Mr. Cochard, Attorney General; Ms. Sivigny, Division Clerk.

CERTIFICATE OF ACCURACY

STATE OF NEW YORK)
COUNTY OF NEW YORK) SS.:

Eileen B. Hennessy, being duly sworn, deposes and says that (s) he is a translator associated with Translation Company of New York, Inc., 124 East 40th Street, New York, New York, and that (s) he is thoroughly familiar with the French and

English language and that (s) he translated the attached document relating to:

Ruling on Appeal

from French language into the English language, and that the English text is a true and correct translation of the original, to the best of his/her knowledge and belief.

/s/ EILEEN B. HENNESSY
Eileen B. Hennessy

(Jurat dated Aug. 12, 1983 omitted in printing)

*COSTELL V. IBERIA, LINEAS
AEREAS DE ESPAÑA, S.A.,*

No. 255, Court of Appeal of Valencia, Spain
(Oct. 16, 1981)

TRANSLATION

1st R. 498/80

Served Oct. 16, 1981

(stamped seal)

RULING NUMBER 255

Honorable Justices:

- Presiding
Hon. José Bermudez Acoro
- Justices
Hon. Julio Gallardo Lamas
Hon. Adolfo Fuertes Pintas

In the City of Valencia, on October fourteenth, one thousand nine hundred eight-one.

The First Civil Division of this Jurisdiction, acting in matters involving less than a specified sum, brought before the Court of First Instance

Number One of Valencia by Mr. Manuel-Luis de la Llave Costell against Iberia, Lineas Aéreas de España, S.A., a company, for payment of a sum of money, and pending before said Division pursuant to an appeal filed by the plaintiff, represented and defended by his attorney, Rodolfo Castro Novella; the respondent, Iberia, Lineas Aéreas de España, having appeared herein by its representative, Mr. Ignacio Zaballos Ferrer, under the guidance of José Gonzalez Palenzuela, Esq.,

INCORPORATING the WHEREAS clauses of the decision being appealed,

WHEREAS said decision, handed down by the Judge of First Instance Number One of Valencia on September twelfth one thousand nine hundred eighty, contains the following: "ADJUDGED: Ruling in favor of part of the demand made by Rodolfo Castro Novella, Esq., on behalf of Mr. Manuel-Luis de la Llave Costell, it should be found and adjudged that the defendant, Iberia, Lineas Aéreas de España, S.A., is responsible for the loss of a suitcase weighing fourteen kilos and belonging to the plaintiff, as a result of its loss en route between Milan and Valencia on June 3, 1979, ordering the defendant to pay to the plaintiff damages in a peseta amount equivalent to \$240 at the official rate of exchange on said date, rejecting the other demands of the plaintiff with release to the defendant, all without express ruling ordering payment of the costs of the action. . ."

WHEREAS an appeal was filed against said judgment by the plaintiff, within due time and form, and admitted on both accounts, and the file of the case was received by this Court, before which the parties appeared on the date set; the appeal was heard at a trial held on the second day of this month, at which Counsel for the parties presented their pleadings and moved for a ruling in accordance with the demands of their respective clients;

WHEREAS the provisions of law were complied with, except as stated in the first report;

The Hon. ADOLFO FUERTES SINTAS, Justice, having prepared the opinion of the Court,

The WHEREAS clauses of the decision appealed being accepted except insofar as they conflict with the findings hereinafter set forth;

WHEREAS this action began with a demand by plaintiff for payment of damages occasioned by the loss of a suitcase checked by plaintiff during his return trip to Valencia, Spain, from Milan, Italy, with a stop in Barcelona, which said voyage was made on an aircraft of Lineas Aéreas Iberia, the questions raised being the following: (a) The nature of the carrier's liability; (b) Whether said liability is limited by valuation criteria previously established, or whether it must be adjusted to the actual value of the items lost; (c) In either case, which method is applicable; (d) The question of the conversion into the national currency, especially as regards the date; (e) Possible error in computation; and (f) The subject of the damages, also demanded;

WHEREAS the carrier's liability as regards air transport of merchandise in cases like this one must be understood as legal in nature, since, aside from considerations of any other type and considerations of culpability for which the laws hereinafter cited do not establish a dispensation, it is certain that for non-international transport Article 120 of the Air Navigation Law of July 21, 1960, states, "The objective basis for indemnification is the accident or damage, and it will apply up to the liability limits established in this chapter (Chapter XIII), in all cases, including that of fortuitous accident, even when the transporter, carrier, or its employees can prove that they acted with due diligence," and that the Warsaw Convention of October 12, 1929, signed by Spain, and The Hague Protocol that amended it on September 28, 1955 (published, respectively, in the Madrid Gazette of August 21, 1931, and the Official Government Journal of June 4, 1973), provide in Article 18 that the carrier is liable for damage caused in cases of destruction of, loss of, and damage to checked baggage and to merchandise when the damage thereby caused occurs during

air transport, which includes the period during which the objects are in the carrier's custody. It should be noted that The Hague Protocol, which merely modified the Convention, took effect in Spain on March 6, 1966;

WHEREAS in view of the nature of the legal obligation, with an objective basis demonstrating the liability alleged, and which undoubtedly for that reason was never in dispute, only the amount demanded being disputed, there is also no doubt that in determining the amount of indemnity that should be paid in each case the methods established by domestic legislation or international agreements for the respective cases should be used; but it is not feasible, as the appellant plaintiff maintains, to verify the actual value of the items transported and (in this particular case) lost, first, because the texts cited so provide, and second, because the limitation-of-liability clause, which has become the norm in this type of traffic, constitutes part of the passenger ticket and baggage check ticket (page 155, reverse), and it ultimately liberates the injured party from the burden of proof as regards the contents of the lost baggage, giving the party the opportunity to declare a higher value upon payment of a higher amount, which said declaration was not made in this case;

WHEREAS it may be enough to refer to the relevant text included in the passenger ticket and baggage-check ticket in order to prove that the method to be applied in computing the proper indemnity in this case is that of US\$ 20 per kilogram of weight for the lost baggage; but it should be pointed out that this dollar indemnity specified by Iberia in the "general conditions" of its transportation contracts is merely a transcription and an adaptation of the provisions of the "General Transportation Conditions (Passengers)" applicable unless otherwise provided by international conventions in effect, or supplementary to said provisions; it must also be kept in mind (since we are speaking of supplementation) that Article 125 of the Air Navigation Law of Spain, hereinabove cited, provides that in the absence of an international agreement binding upon Spain international air transport liability will be governed by said Law applied reciprocally, with a maximum of 50 Pesetas per

kilogram of weight; but this is not the case, since Spain signed the Warsaw Convention as amended by The Hague Protocol, which requires compliance with the limit of two hundred fifty Francs per kilogram unless the sender makes a special declaration of value; because the gold standard is not in effect in the international monetary system, IATA, and Iberia as a member of IATA, specify in their general conditions the dollar equivalent of the 250 Poincaré franc limit, the approximate equivalent whereof is at the present time US\$ 20; whereas the accuracy of this determination is proven by the fact that Additional Protocol Number 1, annexed to the final document of the International Air Law Conference held in Montréal in September 1975, proposes an amendment to Article 22 of the Warsaw Convention limiting the carrier's per-kilogram liability to 17 Special Drawing Rights, a conventional monetary unit of the Drawing Rights defined by the International Monetary Fund and representing the average value of a series of strong national currencies of countries that are members of the Fund; this points toward the abandonment of the classic patterns of monetary systems which are already outmoded, and the appearance of a new value indicator that at this time (October 1, 1981) is quoted at US\$ 1.1446 per Special Drawing Right; when this amount is multiplied by 17, pursuant to the said Additional Protocol (which has not yet become effective), the result is US\$ 19.4582, which said amount is approximately equal to the amount recognized by the defendant and approved in the decision under appeal as a quantitative indemnification method for each kilogram of weight, which said method should be used;

WHEREAS the question of which date must be used in converting into pesetas the U.S. dollar indemnity has not been discussed, but the date of June 3, 1979, the date of the loss of the suitcase, is specified in the [word illegible]; since this affects the applicable amount, which amount is clearly and specifically determined in the international conventions cited, should be reviewed; said international conventions refer to the value of the national currency "on the date of the judgment" (Article 22 of the Warsaw Convention, in the new wording contained in

The Hague Protocol of September 28, 1955), a criterion that moreover coincides with the one used by our Highest Court in its judgment of November 9, 1957, for the amount of a dollar-denominated travellers check presented for collection;

WHEREAS the judgment appealed was based on an error in the answer to the complaint, the indemnity amount being incorrectly computed as regards the peseta equivalent of US\$ 240; the lost suitcase weighed fourteen kilograms, which multiplied by twenty gives a total of \$280, which said amount is the indemnity to be paid;

WHEREAS with regard to the compensation for moral damage or professional prejudice also alleged in the complaint, the grounds set forth by the Judge *a quo*, and deemed reiterated herein in order to avoid repetitions, warrant confirmation of the judgment that rejected same;

WHEREAS the correction needed in the judgment appealed because of the incorrect computation, and the legal complexity of the case, justify waiver of express order regarding the costs of this action;

W E R U L E:

That considering only what is necessary in the appeal filed by the attorney for Mr. Manuel Luis de la Llave Costell against the ruling issued in the first instance of this action, Iberia, Lineas Aéreas de España, S.A., being the defendant, we confirm said ruling except as regards the amount payable by the defendant to the plaintiff, which said amount is US\$ 280, at the official rate in effect on the date of said ruling, and we make no express provision as regards the costs of this action. A textual certification of this ruling and the appropriate order from this higher court to the lower Court should be issued at the proper time, and the original file should be returned to the lower Court.

So adjudged, ordered, and signed, with calendar certification.

A TRUE COPY
Ignacio Zaballos

CERTIFICATE OF ACCURACY

STATE OF NEW YORK)
COUNTY OF NEW YORK) SS.:

Eileen B. Hennessy, being duly sworn, deposes and says that (s) he is a translator associated with Translation Company of New York, Inc., 124 East 40th Street, New York, New York, and that (s) he is thoroughly familiar with the Spanish and English language and that (s) he translated the attached document relating to:

Ruling on Appeal

from the Spanish language into the English language, and that the English text is a true and correct translation of the original, to the best of his/her knowledge and belief.

/s/ EILEEN B. HENNESSY
Eileen B. Hennessy

(Jurat dated Aug. 12, 1983 omitted in printing)

KISLINGER V. AUSTRIAN AIRTRANSPORT

No. 1 R 145/83,

Commercial Court of Appeals of Vienna, Austria

(June 21, 1983)

TRANSLATION

(stamp)
Received on:
13 July 1983
Law Offices
Dr. J. Lenz

(stamp)
District Commercial Court
Vienna
Received on 27 June 1983

IN THE NAME OF THE REPUBLIC

145/83

The Commercial Court of Vienna, as the Court of Appeals HR Dr. Alfred Obermayer—Marnach as Presiding Judge, as well as the additional Judges, Dr. Ernst Kreimel and KR Dr. Otto Strobl, in the matter of the plaintiff, Dkfm. Marietta Kislinger, professor, Hafnerstrasse 29, 4020 Linz, represented by Dr. Alfred Haslinger, Esq., Kroatengasse 7, 4020 Linz, v. the defendant company, Austrian Airtransport Österreichische Flugbetriebgesellschaft, 1010 Vienna, Schwarzenbergplatz 2, represented by Dr. Josef Lenz, Esq., 1060 Vienna, Gumpendorferstrasse 11, for S. 6,588.32, concerning the appeal by the plaintiff against the ruling of the Commercial District Court of Vienna of 21 February 1983, SZ 11 C 140/82-13, after public oral appeal proceedings, has ruled:

The appeal is *not* granted.

The plaintiff is obligated to compensate the defendant for the costs of the appeals proceeding, set at S. 2,708 (including S. 190.98 Turnover Tax and S. 130.00 out-of-pocket expenses) within 14 days, effective immediately.

Bases for the Decision:

According to the undisputed findings of the disputed ruling, the plaintiff, on her flight OB 4,238 from Madrid to Vienna on 20 April 1981 with the defendant as air freighter, lost her photographic equipment from one of her two pieces of luggage checked in at the airport, and this, from an approximately 10 kg travelcase; the purchase price of said photographic equipment was S. 13,360.40. The plaintiff had not expressly declared, at the counter when checking in her luggage, that there was photographic equipment in her luggage. Concerning this, it was established beyond dispute that the plaintiff had not

expressly been made aware of the notes contained in the ticket about transportation conditions and that the items lost had a weight of 3 kg.

The plaintiff now desires from the defendant, which had compensated her S. 4,100.00 on the occasion of the above event, the additional amount of S. 6,588.32 plus 4% interest from 1 May 1981, as the difference between the present value of her photographic equipment and the compensation sum paid her by the defendant. The maximum liability amount of 250 francs, established in Article 22, Paragraph 2, Letter a) of the Warsaw Agreement (WA) is to be converted into Austrian Schillings according to the value standards contained in Article 22, Paragraph 5 *leg. cit.*, based on the market price for an amount of gold corresponding to the metal content of the fictive franc, because since April 1978, no fixed ratio has existed between the individual currencies and gold. The liability amount estimated by the defendant at S. 410.00 per kg of luggage is thus to be estimated approximately 10 times as high.

The defendant has disputed and essentially objected that the price of gold on the free market is today a result of international speculation with extraordinarily large variations and no longer a means of stabilizing parities and purchasing power. It is therefore also no longer suitable as a determinable value scale. Even before the departure from the gold parity, there had been a market price in addition to the official parity, so that even at that time, the calculation of the International Liability Limits was not to be made based on the "free market gold price" but on the currency gold parity. The WA does not therefore indicate the price for fine gold, but the gold franc, as the value comparison scale. If the plaintiff's opinion is correct, the market price should have been used even before the gold standard was given up, which certainly cannot be maintained based on the text of the agreement.

With the dropping of the currency parity on the gold basis, therefore, a conversion of this type is possible only with a value scale that is also substituted internationally therefor and to which, finally, the currency gold parity is referred. These are the Special Drawing Rights (SDRs), whereby a conversion

amount of 1/15 of a Special Drawing Right results for one franc. This could not be replaced by gold price notations in the free market, because otherwise a value scale would be employed which is different from that contained in the treaty, contrary to the goals of the signatory nations at the time the treaty was concluded.

Based on Article 2 of the German Law of 15 December 1933, RGB1.I/S 1079, valid in Austria, 100 francs are equivalent to 16 Reichsmarks. This provision is supported, pursuant to Article 151 of the Aviation Law of 1957 with the measure that in place of the above-cited Reichsmark amounts, six times the Schilling amount is to be used. From this, a kilo is calculated at the Schilling amount of S 240.00; since the defendant has used the rates for domestic liability of S. 410.00, more than the compensation rate has been used and paid. Moreover, the defendant is completely free of liability according to its transportation conditions for such types of luggage.

With the disputed ruling, the lower court rejected the claim, wherein the starting point was the above state of affairs. In essence, it ruled that the WA, in the version of the Additional Protocol of The Hague, is to be applied thereto. According to this, the nonliability claimed by the defendant is void, for which reason it must compensate the plaintiff for the damages according to Article 22 of the WA at the maximum liability amount stated in this agreement for luggage. The value scale for francs, stated in Paragraph 5, *leg. cit.*, of 65.5 mg gold with a fine gold content of 900/1000 is to be converted into Austrian Schillings, based on the German Provisions of RGB1. 1933/I, S. 1079, introduced with the Gesetzblatt für das Land Österreich [Legal Gazette for the Country of Austria] No. 732/1939, which was validated by the 1957 Aviation Law in such manner that Schilling amounts six times the Reichsmarks amounts are to be used in place of the stated Reichsmarks amount. According to this, however, a compensation amount of only S. 240.00 per kg is obtained, so that, taking the payments by the defendant into account, the plaintiff has received more than she is entitled to demand.

The plaintiff's appeal is directed against this ruling for reasons of incomplete determination of the state of affairs and

incorrect legal evaluation with the petition that the disputed ruling be amended in such manner that the claim be approved; secondarily, a motion of arrest in judgment is made.

The defendant has asked that the appeal not be approved.

The appeal is not justified.

However, we must agree with it that the conversion made by the lower court does not correspond to the applicable jurisprudence. But there is nothing to be won from it for the plaintiff, as will be shown below. The jurisprudence represented in the disputed ruling concerning the conversion to be made of the hypothetical key currency was valid only until 30 September 1963. Article 29 *h* of the Aviation Law, first validated by Article 151, Paragraph 1 of the Aviation Law in the version of BGBI. No. 253/1957, according to which the damage, in the case of an international air transportation, was to be treated pursuant to RGBI. 1933/II, S. 1039, according to same and to the implementing decree RGBI. 1933/I, S. 1079, was profoundly amended by BGBI. No. 200/1963, in effect since 1 October 1963. Only the Warsaw Agreement of 12 October 1929 in the version of BGBI. 286/1961 replaces the above-cited German provisions. The former last version valid since 1 January 1972 received Article 29 *h* of the Aviation Law through BGBI. 236/1971 (Halbmayer—Wiesenwasser, *Das Österreichische Luftfahrtrecht* [Austrian Aviation Law] II/1/1, Appendix II, Page 14). The standards cited at the beginning, arising from German jurisprudence, were thus formally derogated. Pursuant to the last-cited version of Article 29 *h* of the Aviation Law, the Warsaw Agreement in the version of The Hague, BGBI. No. 161/1971 is to be applied to the damage to be judged here, which arose on the occasion of a flight from Madrid to Vienna. This international agreement was transferred through the above-cited point in the Aviation Law into domestic law, and became directly applicable for the courts. The Warsaw Agreement, however, in view of its Article 23, Paragraph 1, is relatively coercive for air freighters in its uniform version, so that the lower court is to be concurred with in that the defendant, absent the applicability of Article 23, Paragraph 2 of the WA to the luggage lost here, cannot

successfully call on the contradictory provisions of Article 15, Section 3, Letter i) of the "General Conditions for the Transportation of Air Passengers and Luggage" of the AUA (Guldemann, Internationales Lufttransportrecht [International Air Transport Law] 11, 136; Koziol, Österreichisches Haftpflichtrecht [Austrian Liability Law] II, 415). The defendant is thus liable in principle for the loss of the plaintiff's luggage. The defendant's liability, however, is limited to 250.00 francs per kilogram of luggage according to Article 22, Paragraph 1 of the WA. Pursuant to Paragraph 5, *leg. cit.*, the calculation unit "franc" corresponds to a weight of 65.5 mg gold of 90.0% purity, i.e., the French gold franc of 1924—1936. This hypothetical currency unit must be converted for practical applications into a national currency. The Agreement leaves it to the applicable national law to provide the office competent therefor. In many cases, the conversion is made in implementation laws. In Sentence 3, the case is settled in which the conversion must be made by the judge in the absence of a long-term fixed ratio between the national currency and the value of gold, whereby the day of the ruling is to be used as the basis. The conversion here is to be made to rounded-off amounts, with approximately $\pm 5\%$ tolerance according to the "gold value" of the relevant national currency (Guldemann, *op. cit.*, 132).

Since, according to Austrian procedural law, the decision bases are to refer, in principle, to the time at which the hearings are closed in the lower-court case, and since it therefore involves, in the case of lost consigned goods, their value at the time the ruling is handed down (ZB1. 1924, 62), the Court of Appeals also holds that for the conversion in the case of a confirmatory ruling, only the time at which the ruling is handed down in the lower court case is the determining factor (Guldemann, *op. cit.*, p. 132).

Since the US ended the gold convertibility of the US dollar in 1971, the problem arose for the multilateral transport conventions, that used a fictive gold currency as the standard for liability limitation, of converting into the relevant national currencies, like the Austrian Schilling, that were not oriented towards a gold value, to the extent that domestic conversion standards had not existed or been created.

The Hamburg Higher Regional Court, in its precedent-setting decision of 2 July 1974, ETR 1974, 701, took the point of view that, after the last official gold counter-value had largely lost its economic importance as a reference point, the purpose of the above-mentioned regulations could best be fulfilled by using the key rate of the national currencies with respect to the SDRs, last set with the member states of the IMF, to determine the liability sum (Georg Groth, *Übersicht die internationale Rechtssprechung zu CMR* [Overview of International Jurisprudence on the CMR], p. 76 FN 107).

A conversion of the "gold franc" into the relevant national currency via the Special Drawing Rights, however, was possible pursuant to the above decision until 31 March 1978. A method generally recognized as binding for converting the gold francs had not been established until then (Braun in transpR 1979, p. 9). Since 1 April 1978, however, there has been no connection between the SDR of the IMF and gold, because with the second supplementation of the so-called Article Agreement, any connection of the currencies to gold as a valuation standard was eliminated. Thus, in all international liability conventions, that used gold francs as a value scale, a lacuna arose (Braun, *op. cit.*, Richter-Hannes, *Die UN-Konvention über die Internationale multimodale Guterbeforderung* [The UN Convention on the International Multimodal Transportation of Goods], 154). The last-cited author, who also denies the possibility of converting the gold francs into the national currencies, based on the situation indicated, and who refers to the risk that could arise therefrom if jurisprudence generally followed the representatives of the real-value theory, that orient on the current market price of an amount of gold corresponding to the metal content of the fictive key currency, in this connection acknowledges that the convention involved would thus violate the intention and purpose of the liability limitations. The actual viewpoint of the member states consists in providing a liability limitation that, however, upon connection to the market value of the gold, would no longer be effective, and rather, in many cases would lead to an unlimited liability. This liability limitation is, however, an essential part of the risk

distribution and therefore is undertaken with a given concept of an amount for the extreme cause of maximum liability, weighing the various interests—even the insurability—and is therefore a compromise decision. The liability limitation should therefore be uniform and as independent as possible of accidental variations in the currency systems. This finally led to the introduction of a fictive gold currency. In theory, it should remain nominally constant until the member states decide on a change in the nominal sum, over longer periods of time, because they intend to introduce a greater liability or because the real value has changed quite decisively.

A reasonable solution, therefore, can be found only with a regulation that avoids sudden variations, to maintain the purpose of the liability limit, with which the majority of the specialist press agrees (Richter-Hannes, *op. cit.*, p. 155, 157, and the citations further indicated in Footnote 205).

Since the Warsaw Agreement is directly applicable to the domestic area for the above reasons, its Article 22 is to be interpreted, or a solution to be sought by analogy, not indeed based on Article 31, Paragraph 1, BGBI. No. 40/180, but rather according to Sections 6 ff of the General Civil Code. It is therefore appropriate to seek a way that corresponds to the extent possible to the liability limitation system standardized in the WA, the basic tendency of which has been stated above, if one does not wish to assume the point of view that a spurious gap has arisen in the law due to the dropping of the gold parity and the maximum liability limits have become completely inapplicable. The way proposed by Braun, *op. cit.*, is offered on the basis of the above decision of the Higher Regional Court of Hamburg. As of 31 March 1978, the following ratios resulted: 1 SDR = 0.888671 g fine gold 1000/1000; 1 gold franc (according to CMR, CIM, CIV) = 10/31 g fine gold 900/1000; three gold francs = 1 SDR.

Converted to the gold francs of the WA with 0.0655 g fine gold 900/1000, this results in 15 gold francs to one SDR. Apparently, starting from the same ratios, the Gold Franc Conversion Law of the Federal Republic of Germany, BGBI. 1980/II, 721, among others, in its Article 2, Paragraph 1, has

converted the value unit 65.5 mg gold 900/1000 pure content via the SDR of the IMF in such manner that 15 value units equals one SDR. Austria, as well, has gone the same way in the Gold Franc Conversion Law, BGBl. 319/1979, but only for the areas of the CIM and the CIV, whereby one SDR equals three gold francs (10/31 g fine gold 900/1000), as the Federal Republic of Germany has also done in Article 4 of its Gold Franc Conversion Law.

For the further considerations, we can use as a starting point that as of 31 March 1983, 15 gold francs in the Warsaw Agreement corresponded to one SDR. In this version, the Court of Appeals is also reinforced by the fact that IATA in its "Passenger Services Conference Resolutions Manual", 3rd Edition, Effective 1 January 1983, in Article 1: Definitions, starts from the same ratio.

The essence of the type of liability limitation selected by the WA, however, prohibits seeing a hard and fast value even in this. Rather, even here, it requires on-going adjustment to the changing value ratios. However, this cannot take place, for the above-mentioned reasons, via the market value of the gold, but rather via the rate for the SDR, as Article 2 of the Austrian Gold Franc Conversion Law for the areas of the CIM and the CIV provide, and this, because it appears applicable by analogy here, to the extent that it pursues the same goals. According to it, for the conversion of the abstract maximum liability limit of the WA for luggage, the value of the SDR in Austrian Schillings at the time the ruling is handed down is decisive. Since the lower court, starting from the existence of the domestic conversion provision applied by it, but already derogated, did not increase the rate of the SDR at the time the ruling was handed down, the proceedings were in need of supplementation to that extent, for which reason the Court of Appeals itself obtained the necessary information from the National Bank, pursuant to Article 496, Paragraph 3, Civil Procedural Code. According to this, the value of the Special Drawing Rights as of 21 February 1983 was 18.43569 Austrian Schillings. This results in a maximum liability limitation of 250.00 gold francs, with a countervalue in Schillings of approximately 308.00.

From all this it becomes clear that the only determination desired by the plaintiff on the appeals ground of "incomplete determination of the state of affairs", concerning the market value of a quantity of gold of 0.0655 g with a fine content of 900/1000 is irrelevant here.

The plaintiff has suffered the loss of only 3 kg of luggage, which can be valued per se, and which had no influence on the value of the rest of the luggage. She has received as compensation, even before the lawsuit, from the defendant S. 4,100.00, i.e., more than was legally owed her, so that her request for yet more is unjustified. She would have had a claim to a greater value for the lost items only if a corresponding declaration had been made.

The appeal therefore must be rejected for all the above reasons.

The decision concerning costs was based on Articles 41 and 50 of the Civil Procedural Code.

Commercial Court of Vienna
1011 Vienna, Riemergasse 7
Part 1, on 21 June 1983

/seal of the Court/ /stamp/
Dr. Alfred Obermayer - Marnach
For the accuracy of the copy,
the Head of the Business
Division:
/illegible signature/

CERTIFICATE OF ACCURACY

STATE OF NEW YORK)
COUNTY OF NEW YORK) SS.:

Susan E. Geddes, being duly sworn, deposes and says that (s)he is a translator associated with Translation Company of New York, Inc., 124 East 40th Street, New York, New York, and that (s)he is thoroughly familiar with the German and

English language and that (s)he translated the attached document relating to:

Two court rulings on appeals concerning Austrian Airlines monetary liability in freight losses.

from German language into the English language, and that the English text is a true and correct translation of the original, to the best of his/her knowledge and belief.

/s/ Susan E. Geddes

(Jurat dated Aug. 12, 1983 omitted in printing)

*RENDEZVOUS-BOUTIQUE-PARFUMERIE
FRIEDRICH UND ALBINE
BREITINGER GMBH V. AUSTRIAN AIRLINES,*

No. 14 R 11/83,

Court of Appeals of Linz, Austria

(June 17, 1983)

TRANSLATION

(stamp)
General Reception Office
of the District Court for
Linz State and Surroundings
and of the Linz Labor Court

(stamp)
Received
on: 12 July 1983
Law Offices
Dr. J. LENZ

(stamp)
Received on 30 June 1983

14 R 11/83

IN THE NAME OF THE REPUBLIC!

The LINZ District Court, as the Court of Appeals, through LGV Presiding Judge Dr. Krichmayr, as the Presiding Judge, as well as Dr. Wanko and Dr. Nagele as assisting Judges, in the matter of the plaintiff company Rendezvous-Boutique-Parfumerie Friedrich und Albine Breitingen Gesellschaft mbH, 4020 Linz, Landstrasse 57, represented by Dr. Alfred Haslinger, Attorney in Linz, v. the defendant party AUSTRIAN AIRLINES Österreichische Luftverkehrs-Aktiengesellschaft, 1107 Vienna, Fontanastrasse 1, represented by Dr. Josef Lenz, Attorney in Vienna, concerning S. 5,433.00 Austrian Schillings, concerning the appeal of the defendant against the ruling of the Linz State District Court of 18 October 1982, 2 C 982/81-15, after oral appeal proceedings, has ruled:

The appeal is granted and the disputed ruling is *amended*, so that it must read as follows:

"The claim petition, that the defendant should pay the plaintiff S. 5,433.00 plus 5% interest within 14 days, is rejected.

The plaintiff must compensate the defendant the suit costs for the lower-court case of S. 10,399.12 (including S. 745.12 Turnover Tax and S. 340.00 out-of-pocket expenses), within 14 days, effective immediately.

The plaintiff must compensate the defendant for the costs of the appeal, set at S. 3,240.37 (including s. 226.77 Turnover Tax and S. 180.00 out-of-pocket expenses) within 14 days, effective immediately.

BASES OF THE DECISION:

The plaintiff requests an amount of S. 5,433.00 plus 5% interest from 1 October 1980 as compensation for the loss of 4 blouses during the air freighting from Rome to Linz-Horsching, performed by the defendant.

The defendant acknowledged the complaint as far as concerns the amount, but disputes the basis therefor, petitions for rejection of the complaint involving costs, and objects that it is liable only for those damages that were ascertained before the

customs dispatch of the goods, as long as the freighted goods were therefore still in the custody of the air freighter; in the declaration of goods for customs purposes, only 7 blouses were missing, for which the plaintiff has already been held harmless with an amount of S. 11,355.72 for the whole. In addition to this, the maximum liability limit has already been exceeded by far, according to Article 22 of the Warsaw Agreement, with this payment.

With the ruling of the Linz State District Court of 18 October 1982, 2 C 982/81-15, the defendant was held to owe the plaintiff the sum of S. 5,433.00 plus 5% interest from 1 October 1980, and the costs of the suit, payable within 14 days.

The lower court made the determinations contained in its decision on pages 3 through 6.

From a legal point of view, the lower court stated that the property damage was subject to the provisions of the Warsaw Agreement in the version of the 1955 Amendment as well as the 1961 Additional Agreement ratified by Austria without reservations. The custody of the defendant and thus the period for air freighting that is a decisive factor in the liability, ended with the transfer of the goods to the plaintiff's shipped (sic) on 2 September 1980. Furthermore, the air freighter was responsible for all damages that occurred during air freighting and not merely for those that were determined during air freighting, and therefore until loss of the custody by the air freighter. Article 22 of the Warsaw Agreement in the applicable version limits liability of the air freighter during transport to 250 francs per kilogram. In the event of loss of only individual items, only the (original) total weight of the freight items involved is taken into consideration in determining the maximum liability amount. Since, of the loss, only 3 or 4 cartons were involved, there are no indications that the cartons differed significantly in size from one another, a weight of approximately 13.5 kg results for the 3 freight items involved. A [illegible word] pursuant to Article 22 of the Warsaw Agreement refers, pursuant to Article 5 of this provision to a currency unit with a value of 65.5 mg gold with a fine content of 900/1000. 250 francs correspond, therefore, to a gold value

of 16.375 g. At the time of the lower court's decision, the price of gold per gram, with a fine content of 900/1000 came to exactly S 242.639; the maximum liability amount per kg of freight therefore came to S. 3,973.21, and for the freight items involved, therefore, to S. 53,638.33. From this results the fact that the maximum liability limit was in no way exceeded by the defendant's payment of S. 11,355.72.

The defendant did not produce relief evidence according to Articles 20 and 21 of the Warsaw Agreement.

The on-time appeal of the defendant is directed against this decision on the appeals ground of incorrect legal evaluation, with the petition that the disputed ruling be altered in such manner that the complaint is rejected.

The plaintiff prepared a written communication of appeal and raised therein the petition repeated in the oral appeal proceedings, that the appeal not be granted and that the first ruling be upheld.

The appeal is founded.

The appellee essentially states that the maximum liability amounts in the Warsaw Agreement referred sensibly to French francs (Poincare Francs) as long as the official gold parities were determined and the International Monetary Fund bound the settlement unit (Special Drawing Rights) to the gold standard. Since the elimination of the link between Special Drawing Rights and gold, and since the dropping of gold parities for currencies and the raging increase over time in gold prices, due to speculation on the free market, the maximum liability amount under the Warsaw Agreement is to be replaced by a corresponding number of Special Drawing Rights from the International Monetary Fund, whereby the conversion key of 1/15 Special Drawing Right to one Poincare Franc is to be used. From this it results that the compensation amount calculated by the defendant and paid for the entire shipment exceeds the actual liability limit of the defendant in the concrete case.

Here it should be stated that the Agreement of 12 October 1929 on the Unification of Regulations for Transportation in International Air Traffic (Warsaw Agreement) was signed on

12 October 1929 by the representatives of a series of States, one of which was Austria. Still in 1929, the official German translation of the Agreement, the authentic text of which is in French, was agreed upon between Austria, Germany and Switzerland. The Agreement was ratified by almost all air-traffic countries in the world. The Warsaw Agreement was not ratified by Austria until Austria was occupied by Germany in 1938. The German Reich had already ratified it in 1933. With respect to this, it issued the law for implementation of the initial Agreement on Unification of Civil Air Law of 15 December 1933, (BGBl. I, 1079). After Germany's occupation of Austria, the Agreement also applied as a domestic standard for Austria (see also Article 1 of the Second Ordinance on the Introduction of German Air Law into the Ostmark, Legal Gazette for the Country of Austria No. 732/1939). The Warsaw Agreement was ratified by Austria first on 29 July 1961 and then went into effect on 27 December 1961 (BGBl. 1961/286). (Hammerle-Wunsch: Handelsrecht III (Commercial Law III), p. 367 f.; Note in Heintz-Loebenstien-Verosta: Das österreichische Recht [Austrian Law], II f. 55).

The original Warsaw Agreement already limited the maximum liability amounts in Article 22. Article 22, Paragraph 4, read: "The above indicated amounts are expressed in French francs with a value of 65.5 mg gold of 900/1000 fineness. They may be converted, in rounded-off amounts, into the currency of any country."

The Warsaw Agreement does not define who the actual air freighter is. From this results a legal uncertainty. Therefore, on 18 September 1961, the Additional Agreement to the Warsaw Convention for the Unification of Regulations resulted from the ICAO Conference in Guadalajara (Mexico), concerning transportation performed by an entity other than the contractual air freighter in international air traffic, which was ratified by Austria on 29 September 1965 and went into effect here on 21 March 1966 (BGBl. 1966/46). The Addition Agreement does not state who the air freighter is, but places both the air freighter that concluded the transportation contract as well as the entity that executes the transportation contract, in a joint

liability community under the Warsaw Agreement (Note in Heintz-Loebenstien-Verosta, *Das österreichische Recht* [Austrian Law] III f., 55/1).

The first change in liability provisions of the Warsaw Agreement occurred with the Hague Protocol of 28 September 1955, by which the Warsaw Agreement was amended; Austria entered into this Agreement, first effective 24 June 1971 (BGBl. 1971/161).

Pursuant to Article XI of this Hague Protocol, it was now provided in new Paragraph 5 of Article 22 of the Warsaw Agreement:

"The franc amounts indicated in this Article refer to a currency unit with a value of 65.5 mg gold of 900/1000 fine content. They can be converted, in rounded-off amounts, into the currency of any country. The conversion of these amounts into national currencies other than gold currencies shall take place, in the case of a court proceeding, in accordance with the gold value of these currencies at the time of the ruling."

Since, pursuant to the final sentence of the Hague Protocol, in case of doubt as well, the text in French governs, the last sentence of Paragraph 5 of Article 22 of the Warsaw Agreement in the version of the Hague Protocol follows in French (see BGBl. 1971/161):

"La conversion de ces sommes en monnaies nationales autres que la monnaie-or s'effectuera en cas d'instance judiciaire suivant la valeur-or ces monnaies a la date du jugement."

["The conversion of these sums into national currencies other than gold currencies shall take place, in case of a court proceeding, pursuant to the gold value of these currencies as of the date of the ruling."]

The Hague Protocol now, is no longer based on the French franc, with respect to the Warsaw Protocol, rather only on the abstract gold francs defined in a certain manner. The newly added third sentence of Paragraph 5 of Article 22 of the Warsaw Agreement in the version of the Hague Protocol is based on the existence of gold currencies and states that the gold value of the national currencies governs for the other member countries. In the French text, a much clearer distinc-

tion is drawn between "monnaie-or" ["gold currency"] and "valeur-or" ["gold value"].

In 1948, Austria entered into the Agreement of July 1944 concerning the International Monetary Fund (BGBI. 149/105, effective for Austria on 27 August 1948). Article IV, Paragraph 1, Letter a) of that Agreement states the obligation that the parity of the currency of any member is to be expressed in gold as a general denomination or in US dollars of weight and fineness, as effective 1 July 1974. The original IMF Agreement therefore obligated the members to indicate an official parity for their currencies with respect to the US dollar or gold.

After giving up a multiple rate system maintained for a transitional period, Austria indicated to the IMF for the first time an official Schilling parity of S. 26.00 to US \$1.00 that resulted, considering the then parity of the US dollar to gold (\$35 = 1 ounce fine gold), in a parity of the Schilling to gold of 0.0341706 g fine gold to S. 1.00. This gold parity was clarified by Article 3, Paragraph 1 of the Customs Tariff Law of 12 March 1958, BGBI. No. 74, as a basis for the amount of customs rates and customs values.

On 1 August 1962, Austria assumed the obligations set forth in Article VIII of the Agreement on the IMF, whereby the Schilling became a convertible currency in the sense of Article XIX, Letter d) of the Agreement on the IMF.

Effective 10 May 1971, the Schilling was valued at:

$$\text{S. } 24.75 = \$1.00$$

$$\text{S. } 1.00 = 0.0359059 \text{ g fine gold.}$$

This change in gold parity became effective via the Amendment to Article 3, Paragraph 1 of the Customs Tariff Law, BGBI. 454/1971.

After elimination of the gold convertibility of the US dollar on 15 August 1971, Austria went to forming the exchange rate according to an indicator system, taking into consideration the rate trend in the stable currencies of its most important European trading partners. When the IMF, to facilitate re-arrangement of the parity ratios, tolerated the announcement of the so-called "key rates" and extended deviation ranges for

exchange rates on 18 December 1971 for a transitional period, Austria established the "key rate" effective 22 December 1971 of S. 23.30 to \$1.00. The gold parity of 10 May 1971 was unaltered.

The international trend led, consequently, to two devaluations of the US dollar (new parity *de jure* effective on 8 May 1972, \$38.00 and as of 18 October 1973, \$42.22 per ounce of fine gold). Effective 13 February 1973, Austria, in anticipation of the later announced second devaluation of the dollar, changed the key rate to S. 20. 97 to \$1.00. On 29 March 1973, a rate of S. 24.7405 was announced to the IMF for a value unit of the Special Drawing Rights introduced according to the IMF Agreement; one Special Drawing Right corresponded to 0.888671 g fine gold and thus to the gold parity of the US dollar existing as of 8 May 1972. (On 26 November 1969, the Federal Law concerning Austria's participation in the Special Drawing Rights system of the IMF, BGBl. No. 440/1969, had already been passed.)

With the IMF Convention going into effect in the version of the second agreement for all members on 1 April 1978 (BGBl. No. 189/1978), the gold parity of the Schilling last announced to the IMF lapsed; in connection therewith, Austria notified the IMF that its exchange rate regulation according to Article IV, Section 2 of the IMF Convention, was based on the intention of maintaining the rate of the Austrian Schilling near the rates of the states participating in the European Monetary Agreement ("currency snake") (Schwarzer-Csoklich-List, *Währungs- und Devisen-Recht* (Currency and Foreign Exchange Law), pp. 7 f.).

Article IV, Section 2, Letter b) of the now valid IMF Agreement states that within the framework of an international currency system of the type existing as of 1 January 1976, the following currency rate regulations, among others, were permissible:

"(i) Maintenance of the value of a currency by the concerned member in Special Drawing Rights, or in a standard selected by the member, other than gold."

In Appendix C, Point 1) of the Agreement, the Fund informed the members that for the purposes of this Agreement, parities, expressed in Special Drawing Rights or in another common denomination permitted by the Fund, could be established. The common denomination could not be gold or another currency.

In Article IV, Section 12, in Appendix B, Points 3) and 7), as well as in Appendix K, Point 2), a Special Drawing Right was set equal to a quantity of 0.888671 g fine gold.

Based on this historical trend, it results that the Warsaw Agreement of 12 October 1929 started from the basis of the French gold franc as a gold currency.

Since the IMF Agreement of July 1944 also provided a gold parity for the currencies of the member countries (neither directly nor indirectly via the gold-convertible US dollar), the last sentence of current Paragraph 5 of Article 22 of the Warsaw Agreement in the version of the Hague Protocol (also taking the French text into consideration) must be seen from this point of view. According to it, a distinction is made only between actual gold currencies and national currencies with gold parities. This means that the gold franc in the sense of the Warsaw Agreement is to be connected with the then official currency gold rate.

Through the cropping of gold currencies and through the ban on gold parities in the sense of the now valid IMF Agreement, Article 22 of the Warsaw Agreement in the version of the Hague Protocol has been materially derogated in connection herewith. This means that the gold quantities resulting from Article 22 of the Warsaw Agreement in the version of the Hague Protocol, are to be replaced, as a maximum liability limit, by a number of Special Drawing Rights within the framework of the International Monetary Fund.

On 1 January 1970, for the first time, Special Drawing Rights were allocated by the International Monetary Fund to the participants in this system. Pursuant to Federal Law of 26 November 1969, BGBI. No. 440, the Special Drawing Rights of the Republic of Austria were transferred to the Austrian

National Bank. Same is entitled to use the Special Drawing Rights as coverage for total circulation pursuant to Article 62, Paragraph 1 of the National Bank Law of 1955 in the applicable version, in their statements, they are to be seen as currency reserves. The value units of the Special Drawing Rights were set, at the time the system was founded, at 0.888671 g fine gold each, which corresponds to the then parity value of the US dollar. The transaction value of the Special Drawing Rights has been determined since 1 July 1974 based on the currency basket, and this first based on 16 currencies, but since 1 January 1981, on only 5 more currencies. The transaction value of one Special Drawing Right in Austrian Schillings as of October 1982 (i.e., the time of the lower court decision pursuant to Article 22, Paragraph 5, of the Warsaw Agreement in the version of the Hague Protocol), has come to 19.1397 (Communications from the Directorate of the Austrian National Bank, No. 4/1983, pp. 37 and 58).

In arithmetical terms, this means:

250 francs to 0.0655 g fine gold each result in a quantity of gold totalling 16.375 g. If one takes into consideration the fine content of 900/1000, this results in a quantity of fine gold of 14.7375 g. From the application of the key, 0.888671 g fine gold = 1 Special Drawing Right, there results accordingly for 250 francs in the sense of the Warsaw Agreement, an equivalent of 16.583752 Special Drawing Rights. If one employs the above-mentioned value of one Special Drawing Right, equal to S. 19.1397, this results in a maximum liability amount of S. 317.41 per kg. Consequently, in the present case, the defendant, via payment of an amount of S. 11,355.72, has completely met its compensation obligations in the sense of the Warsaw Agreement.

This result is further confirmed by the following considerations:

a) Pursuant to the above-mentioned Law on the Implementation of the First Agreement on the Unification of Civil Air Law of 15 December 1933, Reich Legal Gazette I, 1079, the maximum amount established in the French currency in Article

22 of the Agreement was replaced by the corresponding amount in German Reich currency. Upon conversion, 100 French francs were valued at 16 Reichsmarks.

Now the starting point is that for Austria, which, after 1945, was to be considered again as an independent entity subject to international law, did not ("automatically") ratify the Warsaw Agreement, even pursuant to Article 1, Paragraph 1 of the Legal Transition Law, State Law Gazette 6/1945, and thus, after 1945, it cannot be seen as widely valid. If one therefore accordingly uses the above-mentioned German Implementation Provision and if one converts, pursuant to Article 3, Paragraph 2 of the Schilling Law, State Law Gazette 231/1945 in the applicable version, the Reichsmark amounts into Schillings, in the ratio of 1:1, one derives a maximum liability amount of only S. 40.00 per kg.

b) The international convention on Rail Freight Traffic (CIM), on Rail, Personal and Luggage Transport (CIV), concluded on 25 February 1961 in Berne, BGBI. 744/1974, and the Additional Convention to the CIV on Railroad Liability for Death and Injury to Travellers, the upper limits of the railroads' liability are likewise limited with a set number of francs. However, gold francs weighing 10/31 g and of 0.900 fine content are considered francs in the sense of this Convention and its Appendices. Pursuant to the Federal Law of 3 July 1979, BGBI. No. 319/1979 (Gold Franc Conversion Law), the gold francs provided in Article 57, Section 1 of the International Convention on Rail Freight Traffic (CIM), BGBI. No. 744/1974, in Article 53, Section 1 of the International Convention on Rail, Personal and Luggage Transport (CIV), BGBI. No. 744/1974, and in Article 21 of the Additional Convention to the International Convention on Rail, Personal and Luggage Transport (CIV) on Railroads' Liability for Death and Injury to Travellers, BGBI. No. 201/1974, are to be converted into Austrian Schillings via the Special Drawing Rights of the International Monetary Fund, whereby 3 gold francs equal one Special Drawing Right. The value of one Special Drawing Right in Austrian Schillings is determined according to the

calculation methods employed by the International Monetary Fund for its own operations and transactions.

The Austrian legislature has accordingly set a fine gold quantity of 0.8709677 g equal to one Special Drawing Right of the IMF, for the area of international rail traffic. If this conversion key is applied to the gold francs in the sense of the Warsaw Agreement, as of October 1982, in the present case, a maximum liability amount of S. 323.86 per kg results.

c) The Ordinance on the Introduction of German Air Law into the Country of Austria of 1 April 1938, Reich Legal Gazette I, 355, introduced air-law provisions of the German Reich into Austria. What is still important today, and concerns liability, is, among others, the Air Traffic Law in the version of 21 August 1936, Reich Legal Gazette I, 653. The Air Traffic Law was changed first by the Law of 27 September 1938, Reich Legal Gazette I, 1246, and the law of 26 January 1943, Reich Legal Gazette I, 69. In this version it was transformed by the Legal Transition Law of 1 May 1945, State Law Gazette No. 6, into the Austrian Legal Ordinance and was still in effect until 31 December 1957.

The Air Traffic Law of 2 December 1957, BGBI. No. 253, went into effect on 1 January 1958. In Article 151 it introduces regulations on maximum liability amounts as well as on liability insurance and accident insurance, and in Article 152, the Air Traffic Law was eliminated with the exception of the first, second, third and fifth sub-sections of the second section. Thus, the public law provisions of the Air Traffic Law were voided and only the liability-law regulations were retained. The Federal Law of 11 July 1963, BGBI. No. 200, with which the maximum liability limits in air traffic law were raised, amended Articles 23, 29 c, 29 g and 29 h of the Air Traffic Law. With the Federal Law of 8 June 1971, BGBI. No. 236, the maximum liability limits were again increased.

With the latter amendment, the maximum liability amount comparable to the present case, but for domestic air traffic, was increased to S. 430.00 per kg, and this, as of 1 January 1972 (Heinl-Lebenstein-Verosta, Das österreichische Recht [Austrian Law], V a 92).

The Government proposal of 13 June 1961 on the Warsaw Convention of 12 October 1929, BGBl. 1961/286 (RV 432 of the Blg. in the stenographic protocols of the NR, IX. GR), again stated that the scope of the French francs, stated in the Warsaw Agreement—and governing the present case—corresponded in value approximately to an amount of S. 450.00, since the corresponding amount in Article 29 c of the Air Traffic Law (in the applicable version) was S. 240.00, but an increase in the liability limits took place, that, with respect to the then economic relations, were thoroughly desirable for the legislature (see also Note 3 in Heini-Loebenstein-Verosta, *Das österreichische Recht* [Austrian Law] II f., 55).

In contrast to this, later, the increases in the maximum liability amounts in the Air Traffic Law by the Federal Laws of 1963 and 1971 were considered necessary, because Austria had entered into the Warsaw Agreement and the Hague Protocol, and was supposed to avoid a discrepancy in maximum liability amounts in national and international air traffic (Note in Heini-Loebenstein-Verosta, *Das österreichische Recht* [Austrian Law] V a 92).

The amount of S. 430.00 per kg was not increased by the 1976 Value Limits Amendment, BGBl. No. 91 (Article XXI).

The Austrian legislature has thus apparently taken into consideration that the present currency system leads to an interpretation of Article 22 of the Warsaw Agreement in the version of the Hague Protocol, that has even contributed to a reduction in the maximum liability amount applicable in international air traffic.

For all these reasons, the appellee's argument is accepted in that it has fully complied with its maximum liability amount derived from the Warsaw Agreement via the compensation paid by it. That the Warsaw Agreement in the version of the Hague Protocol applies in the present case results from Article 29 h of the Air Traffic Law in its applicable version.

Moreover, reference is made to the relevant and furthermore undisputed legal evaluation by the lower court.

Accordingly, the appeal of the defendant is completely granted and, in opposition to the first ruling, the complaint is rejected.

The ruling on the costs of the proceedings in the lower court case is based on Article 41 of the Civil Procedural Code. Here it must be taken into consideration that their incurrence has been proven by the defendant only to a limited extent.

The ruling on the costs of the appeals proceedings is based on Articles 41 and 50 of the Civil Procedural Code.

(illegible seal)

LINZ District Court, Part 14
on 17 June 1983
(stamp)
Dr. Alois Krichmayr
For the accuracy of the copy
The Head of the Business
Division
(illegible signature)

CERTIFICATE OF ACCURACY
(duplicate of page A)

STATE OF NEW YORK)
COUNTY OF NEW YORK) SS.:

Susan E. Geddes, being duly sworn, deposes and says that (s)he is a translator associated with Translation Company of New York, Inc., 124 East 40th Street, New York, New York, and that (s)he is thoroughly familiar with the German and English language and that (s)he translated the attached document relating to:

Two court rulings on appeals concerning Austrian Airlines monetary liability in freight losses.

from German language into the English language, and that the English text is a true and correct translation of the original, to the best of his/her knowledge and belief.

/s/ Susan E. Geddes

(Jurat dated Aug. 12, 1983 omitted in printing)

CANADA
CURRENCY AND EXCHANGE ACT:

Carriage by Air Act Gold Franc Conversion Regulations,
Jan. 13, 1983, 117 Can. Gaz., pt. II, No. 2, at 431 (Jan. 26,
1983)

P.C. 1983-19

His Excellency the Governor General in Council, on the recommendation of the Minister of Finance, pursuant to section 13.1 of the Currency and Exchange Act, is pleased hereby to make the annexed Regulations respecting conversion of values expressed in gold francs into Canadian dollar equivalents for purposes of subsection 2(6) of the Carriage by Air Act.

REGULATIONS RESPECTING CONVERSION OF
VALUES EXPRESSED IN GOLD FRANCS INTO
CANADIAN DOLLAR EQUIVALENTS FOR PURPOSES
OF SUBSECTION 2(6) OF THE CARRIAGE BY AIR
ACT

Short Title

1. These Regulations may be cited as the *Carriage by Air Act Gold Franc Conversion Regulations*.

Interpretation

2. In these Regulations,
“gold francs” means the francs referred to in subsection 2(6) of the *Carriage by Air Act*;
“S.D.R.” means the special drawing rights issued by the International Monetary Fund.

General

3. For the purposes of subsection 2(6) of the *Carriage by Air Act*, the equivalent dollar value of gold francs shall be determined as follows:

(a) gold francs shall be converted into S.D.R.’s at the exchange rate of 15.075 gold francs per S.D.R.; and

(b) S.D.R.'s shall be converted into Canadian dollars at the exchange rate established by the International Monetary Fund for S.D.R.'s and Canadian dollars.

EXPLANATORY NOTE

(This note is not part of the Regulation, but is intended only for information purposes.)

These Regulations set out the method of converting the gold francs (an obsolete unit of account) referred to in subsection 2(6) of the *Carriage by Air Act* to Canadian dollars.

Registration SOR/83-79 January 14, 1983

ITALY

LAW NO. 84 OF MARCH 26, 1983

90 Gazzetta Ufficiale della Repubblica Italiana (Apr. 1, 1983)

ART. 1

The amounts in gold francs Poincare' foreseen by Art. 22 of the Convention for the unification of some rules relative to the International air transportation, stipulated in Warsaw on Oct. 22nd 1929, are replaced by the following amounts:

- the amount of 125.000 gold francs Poincare', as per nbr. 1, is converted into 8.300 special drawing rights;
- the amount of 250 gold francs Poincare', as per nbr. 2, is converted into 17 special drawing rights;
- the amount of 5.000 gold francs Poincare', as per nbr. 3, is converted into 332 special drawing rights.

ART. 2

The amounts in gold francs Poincare' foreseen by Art. 22 of the Convention for the unification of some rules relative to the

International air transportation, stipulated in Warsaw on Oct. 12th 1929, as amended by Art. IX of the Protocol signed in Aja on Sept. 28th, 1955, are replaced by the following amounts:

- the amount of 250.000 gold francs Poincare', as per nbr. 1, is converted into 16.600 special drawing rights;
- the amount of 250 gold francs Poincare', as per nbr. 1, is converted into 17 special drawing rights;
- the amount of 5.000 gold francs Poincare', as per nbr. 3, is converted into 332 special drawing rights.

ART. 3

The amounts indicated in special drawing rights in the present law are considered as referring to the special drawing rights as defined by the International Monetary Fund. The conversion of these amounts in national currency shall be effected, in case of judicial action, by applying the official parity fixed by the International Monetary Fund at the time of the lawsuit.

The present law, with the seal of the State shall be inserted in the official register of the laws and decrees of the Italian Republic. Anyone is requested to observe it and to make it observed as a law of the State.

Rome, March 26th, 1983

/s/ PERTINI
Fanfani
Goria

*SOUTH AFRICA
CARRIAGE BY AIR ACT
NO. 17 OF 1946*

[ASSENTED TO 8 MAY, 1946]

[DATE OF COMMENCEMENT: 22 March, 1955]

(Afrikaans text signed by the Governor-General)

as amended by

Carriage by Air Amendment Act, No. 5 of 1964
Carriage by Air Amendment Act, No. 81 of 1979

Stat. Rep. S. Afr. (Issue No. 13) 15

ACT

To give effect to a Convention for the unification of certain rules relating to international carriage by air; to make provision for applying the rules contained in the said Convention, subject to exceptions, adaptations and modifications, to carriage by air which is not international carriage within the meaning of the Convention; and for matters incidental thereto.

1. Definitions.—In this Act—

“Minister” means the Minister of Transport;

• • •

2. Ratification of Convention.—(1) The International Convention for the unification of certain rules relating to international carriage by air, signed at Warsaw on the twelfth day of October, 1929 (hereinafter referred to as the Convention), is hereby ratified and confirmed.

• • •

3. Provisions of Convention to have force of law.

• • •

(7) Any sum in francs mentioned in Article twenty-two of the said Schedule shall for the purpose of any action

against a carrier be converted into currency of the Republic in the manner determined by the Minister in consultation with the Minister of Finance and notified by notice in the *Gazette*.

[Sub-s. (7) amended by s. 2 (b) of Act No. 5 of 1964 and substituted by s. 1 of Act No. 81 of 1979.]

DEPARTMENT OF TRANSPORT NOTICE R2031
SEPTEMBER 14, 1979

It is hereby notified that the Minister of Transport Affairs, acting in collaboration with the Minister of Finance, in terms of Section 3(7) of the the Carriage by Air Act, 1946 (Act 17 of 1946) has converted the sums in francs mentioned in Section 22 of the schedule to the said Act into the currency of the Republic in the following manner:

<i>Sum Specified in Schedule in Act—Francs</i>	<i>Currency of the Republic-Rand</i>
250 000	18 140,00
250	18,14
5 000	362,80

JC Heunis, Minister of Transport Affairs.

BA41

DEPARTMENT OF THE TREASURY
BUREAU OF GOVERNMENT FINANCIAL OPERATIONS
STATUS REPORT OF U.S. GOVERNMENT-OWNED GOLD
APRIL 30, 1983

*(Stated at Book Value of \$42.2222 per Fine Troy Ounce)

SUMMARY

	<i>Fine Ounces</i>	<i>*Book Value</i>
Gold Bullion	262,593,743.438	\$11,087,285,554.19
Gold Coin	1,067,413.317	45,068,538.55
Totals	<u>263,661,156.755</u>	<u>\$11,132,354,092.74</u>

<i>Accountable Facility</i>	<i>Gold Bullion</i>		<i>Gold Coin</i>	
	<i>Fine Ounces</i>	<i>*Book Value</i>	<i>Fine Ounces</i>	<i>*Book Value</i>
Fort Knox, KY	147,342,182.443	\$6,221,111,095.54	—	—
In Transit to NY	46.043	1,944.04	—	—
West Point, NY	58,006,890.225	2,449,178,520.48***	992,143.872	\$41,890,496.97
U.S. Assay Offices:				
**San Francisco, CA	3,340,077.339	141,025,413.41	—	—
U.S. Mints:				
Denver, CO	40,524,667.641	1,711,040,622.06	—	—
In Transit to NY	18.966	800.78	—	—
Philadelphia, PA	906.336	38,267.50	1,440.270	60,811.37
Federal Reserve Bank of New York (Gold Custody Account):				
FRB-NY Vault	13,377,755.714	564,838,277.32	73,451.741	3,101,294.10
U.S. Assay Office-NY	—	—	—	—
Federal Reserve Banks—(For display purposes)	<u>1,198.731</u>	<u>50,613.06</u>	<u>377.434</u>	<u>15,936.11</u>
Totals	<u>262,593,743.438</u>	<u>\$11,087,285,554.19</u>	<u>1,067,413.317</u>	<u>\$45,068,538.55</u>

**Includes 10,642.891 fine ounces with a book value of \$449,366.27 in the form of 28 gold bars for display purposes at the San Francisco Old Mint Museum.

***This amount includes \$60,290,025.71 (1,427,922.413 Fine Ounces) shipment received from bank of Canada-Ottawa, subject to verification.

Prepared by:
Monetary & Transit Accounts Section
General Ledger Branch
Division of Government Accounts & Reports

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Nos. 82-1186, 82-1465

Office Supreme Court, U.S.
FILED
OCT 12 1983
ALEXANDER L. STEVENS

IN THE
Supreme Court of the United States
OCTOBER TERM, 1983

TRANS WORLD AIRLINES, INC.,

Petitioner,

—against—

FRANKLIN MINT CORPORATION,
FRANKLIN MINT LIMITED, and
McGREGOR, SWIRE AIR SERVICES LIMITED,

Respondents.

FRANKLIN MINT CORPORATION,
FRANKLIN MINT LIMITED, and
McGREGOR, SWIRE AIR SERVICES LIMITED,

Petitioners,

—against—

TRANS WORLD AIRLINES, INC.,

Respondent.

ON WRITS OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

**BRIEF OF FRANKLIN MINT CORPORATION,
FRANKLIN MINT LIMITED, AND McGREGOR,
SWIRE AIR SERVICES LIMITED**

Respondents in No. 82-1186 and

Petitioners in No. 82-1465

JOHN R. FOSTER

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Franklin Mint Limited

McGregor, Swire Air Services

Limited

Of Counsel:

WAESCHE, SHEINBAUM &

O'REGAN, P.C.

October 12, 1983

Questions Presented

1. What is the proper conversion factor, if any, for the gold franc provision in the Warsaw Convention in view of the Congressional decision to eliminate an official price for gold?
2. Whether a treaty provision should be enforced notwithstanding a subsequent Act of Congress which abandoned the premise upon which the treaty provision had been based?

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1983

Nos. 82-1186, 82-1465

TRANS WORLD AIRLINES, INC.,

Petitioner,

—against—

FRANKLIN MINT CORPORATION,
FRANKLIN MINT LIMITED, and
MCGREGOR, SWIRE AIR SERVICES LIMITED,

Respondents.

FRANKLIN MINT CORPORATION,
FRANKLIN MINT LIMITED, and
MCGREGOR, SWIRE AIR SERVICES LIMITED,

Petitioners,

—against—

TRANS WORLD AIRLINES, INC.,

Respondent.

ON WRITS OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

**BRIEF OF FRANKLIN MINT CORPORATION
FRANKLIN MINT LIMITED, AND MCGREGOR,
SWIRE AIR SERVICES LIMITED**

**Respondents in No. 82-1186 and
Petitioners in No. 82-1465**

Preliminary Statement

Franklin Mint Corporation, Franklin Mint Limited, and
McGregor, Swire Air Services Limited (collectively "Franklin

Mint")¹, respondents in No. 82-1186 and petitioners in No. 82-1465, respectfully submit this brief on the merits in these consolidated cases.

Statement of the Case

This action arises out of the loss by Trans World Airlines, Inc. ("TWA") of four packages of numismatic materials with a value of \$250,000. Before the district court TWA conceded its liability under the Warsaw Convention² for the loss of this property (JA15).³ Consequently, the only matter in dispute in this action is the extent to which TWA can limit its liability under Article 22⁴ of the Convention. In considering this question, the Court must take into account the historical changes that have occurred in three areas since the Warsaw Convention was opened for signature in October 1929.

A. The End of the Official Price of Gold⁵

Following the cataclysm of World War I, the major currencies

¹Franklin Mint's amended designation of corporate relationships pursuant to Rule 28.1 is stated in the Appendix to this brief at page A3.

²Formally known as the Convention for the Unification of Certain Rules Relating to International Transportation by Air, *opened for signature* October 12, 1929, 49 Stat. 3000, T.S. No. 876 (1934), 137 L.N.T.S. 11, *reprinted in* 49 U.S.C. §1502 note (1970).

³References in the form "JA _____" are to the Joint Appendix.

⁴Article 22 is reprinted in full at page A1 of the Appendix to this Brief.

⁵For brief descriptions of the economic history relevant to this action, see P. Heller, "The Value of the Gold Franc-A Different Point of View," 6 J. Mar. L. & Com. 73, 79-91 (1974); T. Asser, "Golden Limitations of Liability in International Transport Conventions and the Currency Crisis," 5 J. Mar. L. & Com. 645, 650-52 (1973-74); P. Kennedy, Memorandum, Policy Development Division, Bureau of Consumer Protection, Civil Aeronautics Board (Mar. 18, 1980) ("Kennedy Memorandum") (JA42); Senate Comm. on Foreign Relations, Bretton Woods Agreements Act, S. Rep. No. 94-1148, 94th Cong., 2d Sess. (1976), *reprinted in* 1976 U.S. Code Cong. & Ad. News 5935. See also L. Yeager, *International Monetary Relations: Theory, History, and Policy* (2d ed. 1976).

of the West (with the exception of the Spanish peseta) attempted, with varying degrees of success, to cope with the post-War inflation by a return to the international monetary system prevalent before 1919. This system, often called the gold standard, meant that a particular currency was, at least in theory, freely convertible into an established quantity of gold. The rationale for the gold standard is that it is a means of controlling inflation by linking the money supply to an independent standard of value. In France, for example, the fiscally conservative Raymond Poincare was elected as Premier in 1926; and in June 1928 he stabilized the franc by returning France to the gold standard.

The United States had never gone off the gold standard, however, and the gold content of the dollar was set by statute at 25.8 grains of gold. Gold Standard Act of 1900, ch. 41, §1, 31 Stat. 45 (1900). This provision was still in effect at the time of the final negotiations of the Convention in 1929, and hence the official price of gold then was \$20.67 per troy ounce.

Following the Great Depression, many nations went off the gold standard and allowed their currencies to float. England did so in 1931, for example, and France followed suit in 1936. Although the United States remained on the gold standard, certain changes were made. For example, private ownership of gold was prohibited; and the redemption of dollars into gold was restricted to dollars held by foreign central banks and licensed private users.

More importantly, however, on 31 January 1934 the U.S. Gold Reserve Act devalued the dollar about 60% by reducing the legal equivalent of each dollar to 155/21 grains of gold. Presidential Proclamation No. 2072 of January 31, 1934, 48 Stat. 1730 (1934), pursuant to the U.S. Gold Reserve Act of 1934, 48 Stat. 337 (1934). In other words, the price of gold was increased from \$20.67 to \$35.00 per troy ounce.

During the 1930's the existing monetary system was recognized as clearly inadequate and as a major causal factor of the international depression. Furthermore, the damage to the various national economies (except that of the United States) caused by World War II helped create a consensus that the free world's monetary system had to be different in the post-War world.

The outcome of this consensus was the conference at Bretton Woods, New Hampshire, in July 1944. One result of this conference was the creation of the organization known as the International Monetary Fund ("IMF"). In order to restore currency-exchange stability, and thereby restore world trade, the Bretton Woods Conference also made the decision to change the international monetary system into a "gold exchange" standard.

Under Article IV of the Articles of Agreement, each member was required to nominate a par value for its currency in terms of either gold or the U.S. Dollar that was in effect on 1 July 1944. The member was also required to maintain its rate within 1% of this par value. The Articles of Agreement also guaranteed the conversion into gold of major currencies and required members to purchase its currency from other members in gold or in the other nation's currency. The IMF was also provided with credit facilities to stabilize the currencies of countries having balance of trade difficulties.

The participation of the United States in the IMF was formalized with the enactment of enabling legislation. Bretton Woods Agreements Act of 1945, Pub. L. No. 79-171, 59 Stat. 512 (1945). The par value of the U.S. Dollar was set at one thirty-fifth of a fine troy ounce of gold, *i.e.*, \$35.00 per troy ounce.

As a result, under the gold exchange standard the currencies of the free world were in practice linked to the dollar, while the dollar was based on gold. This role of the dollar as the linchpin of the system was a simple recognition of the facts that the

United States was the predominant economic force in the world and, in addition, possessed as reserves most of the world's gold supply.

During the 1960's this monetary system came under increasing pressure. For one thing, the huge superiority and strength of the United States relative to the rest of the world declined following the reconstruction of Europe and Japan. Inflation generated by the expenditures of the Vietnam War further accelerated the flow of dollars abroad. In addition, the need of the international system for dollars had grown to the point where the United States simply could not supply the dollars without weakening its own internal economy. As a consequence, the U.S. commitment to redeem dollars for gold became a physical impossibility.

As part of an attempt to remove the dollar from the center of the monetary system, the IMF adopted in August 1969 the use of an artificial unit of account called the Special Drawing Right ("SDR"). This accounting tool, originally defined as .888671 grams of fine gold, was established as a new form of reserve asset to be used by member nations among themselves as a supplement to the use of gold and dollars.

In 1966 France pulled out of the so-called Gold Pool, an arrangement created in 1961 by the central banks of various nations to maintain the official price of gold within certain margins. As a result of France's action and the continuing deterioration of the U.S. economic position, the central bankers could no longer maintain the official price of gold at \$35/oz. The consequence was that in March 1968 a "two-tier" system arose. The various national governments would use among themselves one price of gold, the official price of \$35, while private banks and individuals would buy and sell gold on the free market.

The change to a two-tier system was inadequate to stay the pressure on the dollar, however; and in August 1971 President

Nixon cut the link between gold and the dollar. While there was still an official price of gold, dollars could not be presented by foreign governments to the U.S. Treasury for conversion into gold. This elimination of the link between gold and the dollar in effect destroyed the monetary structure established at Bretton Woods.

Later that year, in December 1971, as part of the Smithsonian Agreement, the United States agreed to devalue the dollar. The official price of gold was consequently increased from \$35 to \$38 per ounce. The Agreement also provided for a system of central rates of exchange which would be more flexible (a margin of $2\frac{1}{4}\%$ on both sides of the central rate) than the system of par values established under the original Articles of Agreement of the IMF.

Devaluation of the dollar was formally accomplished by passage of the Par Value Modification Act, Pub. L. No. 92-268, 86 Stat. 116 (1972),^o on 31 March 1972.

This Congressional action was necessary because the Bretton Woods Agreements Act of 1945 prohibited any change in the par value of the dollar without prior Congressional approval. See 22 U.S.C.A. § 286c.

With continuing balance of payments deficits, however, the 1971 devaluation of the dollar proved to be only a temporary palliative. In 1973 the dollar was again devalued, this time by 10%. The official price of gold rose from \$38 to \$42.22 per ounce. This devaluation was accomplished by Congress amending the Par Value Modification Act. Act of September 21, 1973, Pub. L. No. 93-110, 87 Stat. 352 (1973).

Nevertheless, the 1973 devaluation of the dollar was also unable to save matters. By March 1973 all of the major trad-

^oThe text of the pertinent portion of the Act, as amended, is included in the Appendix to this Brief at page A2.

ing nations, with few exceptions, were already floating their currencies and allowing world exchange markets to set currency values. This de facto floating of currencies clearly violated the Bretton Woods Agreement. Realizing that the system of fixed exchange rates was no longer being complied with by its members, the IMF began efforts to shape a new monetary system.

In the Jamaica Accords of 1975, it was agreed by the member nations of the IMF to eliminate gold as the basis of the international monetary system. In the IMF this change was reflected in the Second Amendment to the Articles of Agreement. Effective 1 April 1978 the SDR was to be the sole reserve asset to be used by the member nations of the IMF in their official dealings with each other. Because the currencies of the member nations would float against one another in accordance with market forces, the maintenance of a par value of each currency in terms of gold was unnecessary and was, in fact, prohibited by amendment to the IMF's Articles of Agreement.

In the United States the change was made by the Bretton Woods Agreement Act of 1976, Pub. L. No. 94-564, 90 Stat. 2660 (1976). The result of this statute was to completely eliminate the definition of the dollar in terms of gold as of 1 April 1978. In short, as of that date, there is no longer in the United States an "official" price of gold. Since April 1978 the currencies of the free world, including the U.S. dollar, have floated against one another to achieve a price set by the market. The value of gold has likewise floated against the currencies of the world in accordance with market forces.

From the proclamation of the Warsaw Convention by President Roosevelt in 1934 until 1 April 1978, Article 22 posed no difficulty in the United States. As there was always a price of gold set by statute during this period, the gold unit in Article 22 was easily converted into dollars. This official price of gold no longer exists, although there is still a price of gold which can be used by the Court, the free-market price.

B. The Development of the Airline Industry

The second area of historical change which is important to the present dispute is the development of the airline industry. What was a new industry at the time of the Warsaw Convention negotiations has since developed into a mature sector of the international economy.

In 1929 international air transportation was still largely the province of adventurers. Lindbergh crossed the Atlantic in 1927, and Earhart did so in 1928. As stated in an internal CAB memorandum, "Furthermore, the delegates [to the Warsaw Conference] had little sympathy for anyone foolish enough to board an airplane without enough personal insurance to provide for his widow (or her widower) and children should the plane crash." (Kennedy Memorandum, *supra* at note 5; JA49-50; footnote omitted.)

Professor Lowenfeld has described the period in the following terms:

The larger airliners could carry 15 to 20 passengers at cruising speeds of about 100 miles per hour and over stages of about 500 miles. The most advanced and popular United States aircraft, the Lockheed Vega, which carried six passengers and a pilot, had a cruising speed of about 120 miles per hour and a range of about 550 miles. Though the airplane had been invented at roughly the same time as the automobile, its coming of age as a common means of transportation lagged at least a generation or more behind. (A. Lowenfeld, *Aviation Law* §2.1 at 7-26 (2d ed. 1981).) ("Lowenfeld")⁷

⁷"The Convention was concluded in 1929—a time when commercial air transport was relatively primitive, and international commercial aviation even more so." Aeronautics Committee of the Association of the Bar of the City of New York, Report on the Rio Proposals To Amend the Warsaw Convention As They Affect Passengers' Personal Injuries and Death Claims, 22 J. Air L. & Com. 358, 359 (1955).

The Reporter to the Warsaw Convention, Henri de Vos, pointed out in his introductory remarks that in Belgium "on one single aerodrome in the summer season, there are up to 36 departures of regular lines by day." R. Horner and D. Legrez, *Second International Conference on Private Aeronautical Law, Minutes, Warsaw, October 4-12, 1929*, 23 (1975) ("Minutes"). As the result of developments, there was "the possibility that tomorrow, in all countries, facilities will be set up for both day and night flights!" *Id.* The conclusion to be drawn was that "What the engineers are doing for machines, we, lawyers, must do the same for the law." *Id.*

The tenuous position of the airline industry was reflected in the drafting of the Warsaw Convention. Low liability limits were intentionally specified as an inducement to the growth of the new industry.

But it was expected that such a [liability] limit [of 125,000 gold francs], applied uniformly on international flights—and, it was hoped, internally as well through corresponding legislation in the member countries—would enable airlines to attract capital that might otherwise be scared away by the fear of a single catastrophic accident. (A. Lowenfeld and A. Mendelsohn, "The United States and the Warsaw Convention," 80 Harv. L. Rev. 497, 499 (1967); footnote omitted.)

This policy was also recognized when the Convention was submitted in 1934 to the U.S. Senate for ratification. As Secretary of State Hull said in his report to the Senate:

It is believed that the principle of limitation of liability will not only be beneficial to passengers and shippers as affording a more definite basis of recovery and as tending to lessen litigation, but that it will prove to be an aid in the development of international air transportation, as such limitation will afford the carrier a more definite and equi-

table basis on which to obtain insurance rates, with the probable result that there would eventually be a reduction of operating expenses for the carrier and advantages to travellers and shippers in the way of reduced transportation charges. (Report of Secretary of State Cordell Hull, March 31, 1934, [1934] U.S. Av. Rep. 239, 242.)

In 1983, however, the situation is quite a different matter. As stated in the *amicus* brief of the International Air Transport Association, "The International Air Transport Association (IATA) is an organization of 123 international air carriers, many of whom either represent or are more than 50% owned by foreign sovereign nations that are parties to the Warsaw Convention." (IATA Brief on the merits at 2.) Even for those airlines not owned by a foreign government, the situation has changed radically since 1929:

By the late 1950's, the argument originally stressed by the supporters of Warsaw—that the Convention was needed to attract capital to an infant industry—looked very much out of place. Though the profitability of the aviation industry had varied from year to year and country to country, its growth by any measure—capital, number of employees, gross revenue, equipment, passengers carried, shareholders—had been spectacular, especially since World War II. On the other hand, the accident rate was low and getting lower. Airlines were able to insure against liability to passengers, and while the rates varied, the cost of insurance in terms of overall costs was not a crushing burden. No potential investor or banker, it would seem, would make his investment or loan decisions turn on the limit of liability for accidents to passengers in international flight. The proof, if proof were needed, was that aviation had grown fastest in the United States, without benefit of a liability limit in three quarters of the states. The argument, accordingly, shifted toward protection of plaintiffs. (Lowenfeld, *supra*, § 4.31 at 7-105; footnotes omitted.)

Furthermore, according to Professor Lowenfeld, the shifts in tort law and in choice of law rules have made the claimed benefits of the Convention to plaintiffs no longer what they once were in the early 1930's. Lowenfeld, *supra*, at §§ 4.32, 4.33. This point was made in 1970 by a noted aviation defense lawyer:

The advantages of the liability system created by the combined effects of Articles 17 and 20 were undoubtedly significant in the 1930's and even in the 1940's. However, circumstances have changed. Investigation of the causes of accidents has reached a very advanced stage and it is rare today that the probable cause of an accident cannot be determined as a result of the combined efforts of the governments concerned, the air carrier and the manufacturer. Additionally, there has developed in the 1950's and 1960's in the United States a very formidable array of attorneys who have acquired unparalleled ability in digging into the facts of an accident with a view to determining the cause for civil litigation purposes.

Finally, the doctrine of *res ipsa loquitur* is now applicable generally throughout the United States to aviation accident litigation. (G. Tompkins, "Limitation of Liability by Treaty and Statute," 36 J. Air L. & Com. 421, 431 (1970); footnote omitted.)

As a consequence of the changed position of the international airline industry, Franklin Mint contends that one of the original policies of the Warsaw Convention is no longer applicable, namely, the desire to give protection to an infant industry. This view was adopted in the Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705 (1978) in which the Civil Aeronautics Board was required as a policy guideline to consider as a factor for interstate and overseas air transportation, "[t]he placement of maximum reliance on competitive market forces and on actual and potential competition".

In the context of the Warsaw Convention, this change in the

basic nature of the industry was emphasized in the opening statement by the U.S. delegation to the Montreal Conference of 1966:

But the overriding issue in the Warsaw Convention, as we see it, is that it was entered into in the late 1920's, when international aviation was hardly over the experimental stage and when the primary need was a means to prevent the growth of international aviation from being choked off by one or more catastrophic accidents. Today, in contrast, international aviation is big business. We are over the experimental stage. We are over the infant industry stage. Equally important, the techniques, equipment, and experience of our current international air transportation are such that the hazards of flying have been very much reduced and are actuarially predictable.

For these reasons the United States believes that there is no longer justification for a Convention which tips the balance heavily in favor of the industry and against the consumer. (*Quoted in Lowenfeld, supra*, § 5.31 at 7-131.)

This statement is still true, and the Court should consequently give predominance to a Convention policy that is still valid: the granting of equitable awards based on a unit of account reflecting real value. See, e.g., P. Heller, "The Value of the Gold Franc-A Different Point of View," 6 J. Mar. L. & Com. 73, 94-95 (1974).

C. From the Warsaw Convention to the Montreal Protocols

The final area of significant change consists of the various amendments to the Warsaw Convention since it was first promulgated in 1929.

The Convention was seen as the beginning of an on-going process to codify international air law. As a vice-president of the Warsaw Conference stated


Therefore, we should consider that in air navigation, it is necessary to begin by laying down the primary general rules of the problem; we make a first effort and we must be happy to do so. If there are improvements to be brought forth, life does not end today, we can do them later on. (Minutes, *supra*, at 32.)

As mentioned above, the Warsaw Convention provided low limits of recovery as an aid to a new infant industry. Following World War II, this situation no longer seemed proper to many, and criticism of the limits in the Convention was expressed. See, e.g., C. Rhyne, "International Law and Air Transportation," 47 Mich L. Rev. 41, 54-61 (1948). As a result, there were conferences concerned with revision of the Warsaw Convention in 1946 (Cairo), 1948 (Lisbon), 1949 (Montreal), 1952 (Paris), and 1953 (Rio de Janeiro).

Popular dissatisfaction with the limits, particularly as to personal injuries, was heightened as a result of the publicity surrounding entertainer Jane Froman, who was seriously injured in a plane crash in 1943. In her suit against Pan Am, her recovery was limited to \$8,291.87. *Ross v. Pan American Airways*, 299 N.Y. 88, 85 N.E. 2d 880 (1949), *cert. denied sub nom.*, *Froman v. Pan American Airways*, 349 U.S. 947 (1955). The outcome of this dissatisfaction was the Hague Conference of 1955, in which the United States took the lead.⁸ The resultant Hague Protocol of 1955 doubled the limits for liability in case of personal injury to \$16,600. Although the United States signed this protocol, it was never ratified by the Senate.

In November 1965 the United States stated its intention to withdraw from the Convention at the end of six months pursuant to Art. 39 of the Convention. The reason given for this action was the low level of liability for personal injury. U.S.

⁸The leading article on the revisions to the Convention up to the Montreal Agreement of 1966 is A. Lowenfeld and A. Mendelsohn, "The United States and the Warsaw Convention," 80 Harv. L. Rev. 497 (1967).



Dep't. of State, Press Release No. 268, 53 Dep't. of State Bull. 923 (1965).

A hurried conference resulted, which produced the Montreal Agreement of 1966. This Agreement is not a treaty, but is instead a private agreement⁹ subscribed to by the world's major airlines. In the Agreement the airlines agreed to (1) raise the limit for personal injury to \$75,000.00, and (2) waive certain defenses under the Warsaw Convention. The United States withdrew its denunciation and thereby remained a party to the Convention. U.S. Dep't. of State, Press Releases Nos. 110-11, 54 Dep't. State Bull. 955 (1966).

In 1971 another meeting was held to consider revisions to the Warsaw Convention.¹⁰ The resulting Guatemala City Protocol¹¹ raised the limit for personal injury liability from the 125,000 gold francs in the Convention to 1.5 million gold francs. The United States signed this protocol, although the Senate has never ratified it.

The last amendment of note is the set of protocols signed at the Diplomatic Conference on Air Law in Montreal in September 1975.¹² The relevant change for present purposes is that

⁹Antitrust immunity was given in C.A.B. Order No. E-23,680, 31 Fed. Reg. 7302 (1966).

¹⁰The background and proceedings of this conference are described in R. Mankiewicz, "The 1971 Protocol of Guatemala City to Further Amend the 1929 Warsaw Convention," 38 J. Air L. & Com. 519 (1972).

¹¹Guatemala City Protocol, *done* Mar. 8, 1971, *reprinted in Lowenfeld, supra*, Documents Supplement at 975.

¹²Montreal Protocols Nos. 3 & 4, *done* September 25, 1975, *reprinted in Lowenfeld, supra*, Documents Supplement at 985. These protocols are discussed in G. FitzGerald, "The Four Montreal Protocols to Amend the Warsaw Convention Regime Governing International Carriage by Air," 43 J. Air L. & Com. 273 (1976). See also D. Sheinfeld, "From Warsaw to Tenerife: A Chronological Analysis of the Liability Limitations Imposed Pursuant to the Warsaw Convention," 45 J. Air L. & Com. 653 (1980).

the SDR was substituted for the gold franc as the unit used in expressing limits of liability in the Warsaw Convention and its progeny. According to one participant at the conference, however, the measure was adopted without an "in-depth discussion of the implications"¹³

The Montreal Protocols were signed by the United States, and President Ford sent them to the Senate in January 1977. 123 Cong. Rec. 1148 (1977). On 8 March 1983 the Protocols came up for a vote and were soundly rejected by the Senate. 129 Cong. Rec. S2279 (daily ed. March 8, 1983). Although the Protocols still remain on the Senate calendar because of Senator Baker's request for reconsideration, it has been suggested that "the current thinking is that renegotiation of the limitation will probably precede any such vote." C. Dubuc and L. Doctor, "Legislative Developments Affecting the Aviation Industry," 48 J. Air L. & Com. 263, 264 (1983).¹⁴

The above brief history is relevant for two reasons. First of all, the various amendments concerning liability limits have not been uniformly adopted by the different nations. Thus, for example, Great Britain adheres to the Hague Protocol, but the United States does not. In addition, some countries have internal legislation affecting the calculation of the Warsaw Convention limits.¹⁵ The result is that an international uniform limit of liability is impossible in the present world because not all nations are following the same text.

¹³A. Tobolewski, "The Special Drawing Right in Liability Conventions: An Acceptable Solution?", Lloyd's Mar. & Com. L.Q. 169, 173 (1979 Part Two).

¹⁴Mr. Dubuc is former counsel of record for *amicus* IATA.

¹⁵See, e.g., Italian Law No. 84 of March 26, 1983, 90 Gazzetta Ufficiale della Repubblica Italiana (April 1, 1983) (reprinted in TWA's Brief on the Merits at BA37); Canadian Currency and Exchange Act: Carriage by Air Act Gold Franc Conversion Regulations, January 13, 1983, 117

(Footnote continued on following page)

Secondly, as this history shows, since the end of World War II there has been a concern with the low level of liability stated in the Warsaw Convention of 1929. It has been the consistent policy of the United States Government in this period to seek to raise these limits to more realistic levels. Although the focus of the various conferences has been on personal injuries, similar considerations are applicable to cargo as well. Consequently, in furtherance of this policy, the Court should seek to expand the rights of those who suffer damages because of the fault of international air carriers.

Summary of Argument

The carrier's limit of liability under the Warsaw Convention is expressed in gold francs. It is clear from the text of the treaty, the minutes of the drafting conference, the practice of this country for almost fifty years, several foreign legal decisions, and commentaries, that the gold franc must be converted into dollars using a gold value. The only existing price of gold, and hence the only one that can rationally be used for Article 22, is that set by the open market. Use of either of the proposals suggested by TWA means changing Article 22 from a gold clause to a currency clause. The so-called "last" official price of gold has not existed since 1978 and is therefore nothing more than a fiction. Use of the SDR means by-passing the Senate and amending the Convention on an issue presently before that body.

Alternatively, the Court can determine that Article 22, as presently written, is unenforceable. Article 22 of the 1929 Con-

(Footnote continued from previous page)

Can. Gaz., pt. II, No. 2, at 431 (Jan. 26, 1983) (reprinted in TWA's Brief on the Merits at BA36); United Kingdom's Statutory Instrument 1980 No. 281 (JA70); South African Carriage by Air Act, No. 17 of 1946, §3(7), *as amended* by No. 5 of 1964 and No. 81 of 1979, Stat. S. Afr. (Issue No. 13) 15, *implemented by* Dep't. of Transport Notice R 2031 (Sept. 14, 1979) (reprinted in TWA's Brief on the Merits at BA39); Sweden's Carrier by Air Act (1957:297), ch. 9, §22 (*as amended* Mar. 30, 1978) (JA67).

vention was premised on the existence of a gold-dollar ratio set by government fiat. The international community abandoned this assumption in the Jamaica Accords of 1975, and domestically the Congress eliminated an official gold price by the repeal of the Par Value Modification Act. Although the Congress abandoned the assumption upon which Article 22 had been based, the legislature has failed to provide a new standard of recovery, such as the SDRs used in the Montreal Protocols of 1975. The conclusion that the Congress modified the Warsaw Convention by its repeal of the Par Value Modification Act is supported by established principles of domestic constitutional law.

If the Court determines that Article 22 is unenforceable, the Court should make this holding effective as of 1 April 1978, the date when Congress cut the official link between gold and the dollar. Giving retrospective effect to such a ruling comports with the Court's normal procedure and is further justified by the facts that (1) the airlines have known since the mid-1970's of the uncertainty surrounding Article 22, (2) retroactive effect is in furtherance of the rationale of the ruling, and (2) substantial inequity would result to Franklin Mint and similar claimants by a contrary decision.

ARGUMENT

POINT I

If enforceable, the Article 22 limit should be converted into dollars using the free-market price of gold.

Article 22¹⁸ of the Warsaw Convention states in pertinent part:

- (2) In the transportation of checked baggage and of goods, the liability of the carrier shall be limited to a sum of 250 francs per kilogram, . . .

* * *

¹⁸Article 22 of the Convention is reprinted in full at page A1 of the Appendix to this Brief.

(4) The sums mentioned above shall be deemed to refer to the French franc consisting of $65\frac{1}{2}$ milligrams of gold at the standard of fineness of nine hundred thousandths. These sums may be converted into any national currency in round figures.

From 1934, when the United States adhered to the Convention, until 1978, the above treaty language posed no problem. In the United States during this period there was always a relationship between gold and the dollar which was fixed by law. Thus, for example, in 1934 the value of gold was set at \$35.00 per troy ounce pursuant to statute, U.S. Gold Reserve Act of 1934, 48 Stat. 337 (1934); and Presidential Proclamation No. 2072 of January 31, 1934, 48 Stat. 1730 (1934).

The problem arose in 1978 when the United States cut the statutory link between gold and the dollar. As mentioned above, this break was made in the United States as part of the international economic agreement called the Jamaica Accords of 1975. Pursuant to the Bretton Woods Agreements Act of 1976, Pub. L. No. 94-564, 90 Stat. 2660 (1976), the definition of the dollar in terms of gold was eliminated. As a result, since the effective date of the statute, April 1, 1978, there is no longer in the United States an "official" price of gold.

Because of this change in the statutory role of gold, the question has arisen as to the proper means of converting into dollars the gold franc specified in Article 22 of the Warsaw Convention. Franklin Mint submits that (1) if the Convention is interpreted as written and as intended, the reference value must be based on gold, and (2) the only gold price that can be used is that price currently in existence, the free-market price.

The starting point in the interpretation of a statute is the text. *Bowsher v. Merck & Co.*, 453 U.S. 111 (1983); *Dawson Chemical Co. v. Rohm & Haas Co.*, 448 U.S. 176, 187 (1980). The same rule is applicable to treaties. *Sumitomo*

Shoji America, Inc. v. Avagliano, 457 U.S. 176 (1982); *Maximov v. United States*, 373 U.S. 49 (1963); Restatement, Second, of the Foreign Relations Law of the United States § 147 (1)(a), (2) (1962). In the present matter the Convention states¹⁷ "65½ milligrams of gold at the standard of fineness of nine hundred thousandths." The reference to gold is unambiguous.

The Warsaw Convention was the result of a conference held in Poland in October 1929. In the draft version initially submitted, the limit of liability was expressed in French gold francs. See Minutes, *supra*, at 265. After debate the drafters specifically rejected a French proposal to change the text to refer to an undefined French franc.

The relevant minutes of the conference are reprinted in the Joint Appendix beginning at page JA158.

Of particular importance is the view of the Swiss delegate, whose views on this issue were adopted:

Naturally, one can say "French franc" but the French franc, it's your national law which determines it, and one need have only a modification of the national law to overturn the essence of this provision. We must base ourselves on an international value, and we have taken the dollar. Let one take the gold French franc, it's all the same to me, *but let's take a gold value*. (Minutes, *supra*, at JA162; emphasis added.)

The conclusion that the framers of the Convention intended a gold value is supported by earlier events of that year. In July 1929 the Permanent Court of International Justice decided *The*

¹⁷The sole official language of the Convention is French, Article 36, and it is this language that controls. *Block v. Compagnie Nationale Air France*, 386 F.2d 323 (5th Cir. 1967), *cert. denied*, 392 U.S. 905 (1968). There has been no disagreement between the parties as to the English translation of Article 22 which is printed at 49 U.S.C. §1502 note (1970).

Serbian Loans Case, II Hudson, World Court Reports 344 (1935), discussed in V Hackworth, Digest of International Law 630 (1943). That decision involved the interpretation of various international loan agreements in which the payment was based on a gold franc.¹⁸ As the gold franc decreased in gold content between World War I and 1929, the issue was as to the meaning of a gold franc.

The World Court said that "It is manifest that the Parties, in providing for gold payments, were referring, not to payment in gold coins, but to gold as standard of value." *Id.* Furthermore, the World Court also found that "To safeguard the repayment of the loans, they provided for payment in gold value having reference to a recognized standard, as above stated." *Id.* Consequently, a few months later at the aeronautical conference in Poland, there was outstanding an important, recent decision by the World Court holding that the gold franc is a reference to a standard of value.

In interpreting a treaty the court is to give effect to the intentions of the contracting parties. *Rocca v. Thompson*, 223 U.S. 317, 331-32 (1912). The framers of the Warsaw Convention made in Article 22 (4) a specific decision to base the liability limit on a gold value, and this decision can best be honored by the Court by interpreting Article 22 by reference to the market price of gold.

This intent of the Convention's drafters was emphasized by the Argentinean court in *Florencia, Cia. Argentina de Seguros S.A. v. Vaig S.A.* (Federal Civil & Commercial Court, Buenos Aires, Argentina, August 27, 1976), *original text reprinted in* 1977 Uniform L. Rev. 198 (JA169):

The Warsaw Convention does not expressly define the point; it appears to us proper to interpret it in the manner

¹⁸The franc used was the "germinal" franc, which had a different gold content than the Poincare franc.

that the limit of liability established seeks to approximate as accurately as possible the true value of gold (see P.P. Heller, "The Warsaw Convention and the Two Tier Gold Market," cited by A. I. Mendelsohn.) This manner of looking at the problem appears particularly suitable if it is borne in mind that the international legislature desired to have reference to an ideal currency which is defined only by its metallic content, which, in view of its intrinsic character—gold—permanently retains its value. (JA 172.)

The commentator cited by the Argentinean court, Paul P. Heller, has discussed the use of the gold franc in various international conventions and has reached the following conclusion:

From all these statements the following conclusions can be drawn:

The states parties to the several international air and maritime law conventions adopted gold francs as the monetary system for establishing limits of carriers' liability in order to provide limits

(i) which would be uniformly applicable, independent of currency fluctuations, within their jurisdiction, and

(ii) which would protect against inflation by linking the limits to the real value of gold. (P. Heller, "The Value of the Gold Franc-A Different Point of View," 6 J. Mar. L. & Com. 73, 94-95 (1974).)

See also, A. Mendelsohn, "The Value of the Poincare Gold Franc in Limitation of Liability Conventions," 5 J. Mar. L. & Com. 125, 127 (1973-74).

Another factor supporting Franklin Mint's position that a flexible gold value must be used is the practice followed in this country.

During the period between the promulgation of the Convention and the United States' adherence to it, the price of gold

rose about 60% from \$20.67 to \$35.00 per troy ounce. The resulting increase in the liability limit was accepted by all as a matter of course, and there was never a suggestion that the liability limit was frozen at the 1929 level. When the official gold price rose twice during the 1970's, no one contended that the Convention prohibited an adjustment of the carrier's liability limit. The system had the capacity to change with the times.

In fact, this readjustment of the limit because of a change in the price of gold has been used by the airline industry as an argument against changing the Convention limit. For example, following World War II Mr. John Clare, the then-insurance manager of Pan American World Airways, opined that:

. . . [P]owerful basic economic forces continuously, effectively and automatically are correcting the Warsaw Convention limit of passenger liability for changes in the gold value of the national currencies of the various adherent nations. This is a tribute to the farsightedness and excellent judgment of the original framers of this convention. (Clare, "Evaluation of Proposals to Increase the Warsaw Convention Limit of Passenger Liability," 16 J. Air L. & Com. 53 (1949).)

Mr. Clare traces the history of the Warsaw limits in Brazil, Mexico and France to illustrate, in the context of the floating-exchange rate system that existed in all countries (except the United States) prior to Bretton Woods, the automatic increases in the limits caused by the gold standard of the Warsaw limits. Mr. Clare concludes his comments on that history with the following observation:

The recent increase of 42% in the limit of liability in terms of Mexican Pesos and the increase of 80% in the limit in terms of French Francs, which have been cited above, came about because of the fact that the limit of liability now contained in the Warsaw Convention is stated in terms of a commodity, namely, gold.

The automatic way in which the Warsaw Convention limit of passenger liability, expressed in current monetary units, is corrected for changes in the value of money can more easily be understood if the limit of liability is considered as being the value of 236.9 troy ounces of fine gold. In this connection, it should be pointed out that in 1929, when the official U.S.A. gold price was \$20.67 per fine ounce, the Warsaw Convention limit of passenger liability was \$4,898 U.S. Currency. When the price of gold in the U.S.A. was raised to \$35.00 per fine ounce in 1934, the Warsaw Convention limit of passenger liability automatically was increased to \$8,292, U.S. Currency. Table I shows the increases which automatically have occurred in terms of various other currencies since 1929.

It would be a serious mistake to define the limits of liability in terms of anything other than some unit of gold currency of a specified weight and fineness. If the present limit had been stated in 1929 as 125,000 current or paper Francs, the dollar equivalent today would be only \$584 U.S. Currency at the current official rate of exchange. One could not ask for a better illustration of the great protection given to the public by defining the limit of passenger liability in terms of a gold currency unit. (*Id.* at 57.)

See also J. Parker, "The Adequacy of the Passenger Liability Limits of the Warsaw Convention of 1929," 14 J. Air L. & Com. 37, 39 (1947).

A few years later this same point was made by the director of claims for United States Aviation Underwriters, Inc.:

In suggesting that the Warsaw limit should be increased, most people believe that there has been no increase since the Convention was signed in 1929. This is definitely untrue. The limitation has actually been materially increased. This is because the limit on damages is based on the gold standard and all nations, including the United States, have

devalued their currency with respect to gold. For instance, the value of gold has gone up more in the United States than the cost of living, according to the U.S. Air Coordinating Committee's own Economic Division. Generally speaking, the local equivalent in currency of the limit provided by the Warsaw Convention will buy more in the U.S.A. and most other nations, according to information filed with the U.S. Air Coordinating Committee in 1953 than when the limit was originally fixed in Warsaw in 1929. (G. Orr, "The Rio Revision of the Warsaw Convention—Part II," 21 J. Air L. & Com. 174, 176 (1954); footnote omitted.)

In the Hague Protocol of 1955, the Poincare franc was kept as the unit of account for the limitation. The definition was expanded, however, to make it clear that a gold value was intended: "Conversion of the sums into national currencies other than gold shall, in case of judicial proceedings, be made according to the gold value of such currencies at the date of the judgment." The Hague Protocol of 1955, Art. XI, *done September 28, 1955*, 478 U.N.T.S. 371, *reprinted in Lowenfeld, supra*, at Doc. Supp. 955.

During the 1970's the official price of gold changed twice. In December 1971 the price went from \$35 to \$38, and in September 1973 the price rose to \$42.22 per troy ounce. Following each change, the Civil Aeronautics Board required the air carriers to change their tariffs to reflect this change in the price of gold. C.A.B. Order No. 72-6-7, 59 C.A.B. Rep. 953 (1972); C.A.B. Order 74-1-16, 39 Fed. Reg. 1526 (1974).

Because of the Bretton Woods Agreements Act of 1976, Pub. L. No. 94-564, 90 Stat. 2660 (1976), there is no longer a price of gold set by statute. There is, however, a price that is readily and easily available, the market price. Use of the free-market price of gold is supported by the text of the treaty, the practice in this country to use a gold value, and the intention

of the Convention's drafters to "protect against inflation by linking the limits to the real value of gold." (P. Heller, "The Value of the Gold Franc-A Different Point of View", 6 J. Mar. L. & Com. 73, 94 (1974).)

Other than the judges of the Second Circuit, the only circuit judge to express a view on the present problem is Judge Walter Ely, a Senior Judge of the Ninth Circuit. In *Boehringer Mannheim Diagnostics, Inc. v. Pan American World Airways, Inc.*, 531 F. Supp. 344 (S.D. Tex. 1981), appeal docketed, No. 81-2519 (5th Cir. Dec. 30, 1981)¹⁹ he decided this issue by holding that the free-market price of gold should be used:

Allowing defendant to limit its liability under the Convention based on the now-abolished "official" gold price of \$42.22 an ounce would perpetrate a legal fiction of the purest kind. The Court finds no justification in the language or history of the Warsaw Convention to justify such a holding in this case. (531 F. Supp. at 352; footnote omitted.)

* * *

In light of the historical analysis discussed above, the Court finds nothing in these considerations upon which to conclude that it should employ the fiction of an official U.S. price of gold in converting the limitation sums expressed in the Convention. The only proper basis for determining defendant's liability limitation, at least since 1978, is with reference to the freemarket price of gold. (531 F. Supp. at 353; footnote omitted.)

Many of the foreign decisions also support the conclusion that the free-market price of gold should be used. *Cosida S.p.A. di Assicurazioni e Riassicurazioni v. B.E.A.*, Milan Ct. of App., No. 2796/77 (June 9, 1981; Judgment No. 861); *Kuwait Air-*

¹⁹Following oral argument, the Fifth Circuit advised counsel that it will await the Supreme Court's decision in this case. Letters of 4 March and 20 June 1983 to counsel of Chief Deputy Clerk, Fifth Circuit.

ways Corporation v. Sanghi, Regular Appeal No. 54/77 (Court of the Principal Civil Judge, Civil Station Bangalore, India August 11, 1978); *Balkan Bulgarian Airlines v. Tamaro*, (Court of Milan, Italy October 25, 1976); *Florencia, Cia. Argentina de Seguros, S.A. v. Varig, S.A.*, (Federal Civil & Commercial Court, Buenos Aires, Argentina, August 27, 1976), original text reprinted in 1977 Uniform L. Rev. 198; *Zakoupolos v. Olympic Airways Corp.*, No. 256/74, (Court of Appeal, 3d Dep't, Athens, Greece, January 10, 1974).

In a 1980 article on the subject, Paul Heller²⁰ reached the following conclusion:

Under these circumstances, if limitation of liability is to remain part of the legal framework applying to international carriage, I wonder whether the carrier and their insurers could not live and thrive with limitation expressed in terms of gold, to be converted into national currencies at the market value. (P. Heller, "Converting The Gold franc-A Reply from an Unconverted," 5 Air L. 33, 34 (1980).

See also A. Mendelsohn, "The Value of the Poincare Gold Franc in Limitation of Liability Conventions," 5 J. Mar. L. & Com. 125 (1973-74).

In a treatise published in 1981 on the Warsaw system, Dr. Rene H. Mankiewicz, who has had long experience in the Legal Bureau of the International Civil Aviation Organisation, reached the conclusion that "As the purpose of expressing the limits in gold francs was to maintain the purchasing power of the amounts in question, it is submitted that the conversion into national currency should be made at the exchange rate for gold

²⁰As mentioned above, Mr. Heller has been cited by the Argentinean court in *Florencia, Cia Argentina de Seguros, S.A.*, *supra*. He has also been cited by the Second Circuit concerning the Warsaw Convention. See *Day v. Trans World Airlines, Inc.*, 528 F.2d 31, 37 n.17 (2d Cir. 1975), *cert. denied*, 429 U.S. 890 (1976).

on the open market; (citing authorities)." R. Mankiewicz, *The Liability Regime of the International Air Carrier* 114 (1981).

If there is any doubt as to the interpretation of Article 22, those doubts should be resolved in favor of Franklin Mint. Limitations of liability sought to be enforced by common carriers, whether based on law or contract, are in derogation of the common law, and thus must be strictly construed. *Herd & Co. v. Kratwill Machinery Corp.*, 359 U.S. 297, 304-305 (1959).

Not only does the Warsaw Convention preempt inconsistent provisions of local law, see *In re Aircrash at Bali, Indonesia on April 22, 1974*, 684 F.2d 1301, 1308 (9th Cir. 1982), but the Convention also creates Franklin Mint's cause of action. See *Benjamins v. British European Airways*, 572 F.2d 913 (2d Cir. 1978), *cert. denied*, 439 U.S. 1114 (1979). Consequently, the principle stated by the Court in *Bacardi Corp. v. Domenech*, 311 U.S. 150, 163 (1940) should be applied:

Even where a provision of a treaty fairly admits of two constructions, one restricting, the other enlarging, rights which may be claimed under it, the more liberal interpretation is to be preferred.

See also *Factor v. Laubheimer*, 290 U.S. 276 (1933).

This principle has been utilized in a Warsaw Convention cargo case. *Dalton v. Delta Airlines, Inc.*, 570 F.2d 1244, 1246 (5th Cir. 1978).

As alternatives to the free-market price of gold, TWA argues for the use of either the last official price of gold or SDR's of the IMF.²¹ The court should reject both methods.

First of all, TWA's suggestions violate the text of the treaty. As written, Article 22 refers to a gold value. Using either of

²¹TWA has abandoned a third proposal that was argued in the lower courts, viz., use of the current French franc.

TWA's methods means changing Article 22(4) from a gold clause to a currency clause. With the last official gold price, the reference to a gold value would be eliminated because the limit essentially then becomes a specified, fixed dollar amount. Article 22(2) would, in effect, be

(2) In the transportation of checked baggage and of goods, the liability of the carrier shall be limited to a sum of \$20.00 per kilogram, . . .²²

Article 22(4) would be eliminated from the Convention as superfluous.

Using SDR's would also mean amending Article 22 to eliminate the gold provisions. Article 22(2) would become

(2) In the transportation of checked baggage and of goods, the liability of the carrier shall be limited to a sum of 17 Special Drawing Rights per kilogram, . . .²³

As the district court pointed out in *In re Air Crash Disaster at Warsaw, Poland, on March 14 1980*, 535 F. Supp. 833 (E.D.N.Y. 1982), *aff'd on other grounds*, 705 F.2d 85 (2d Cir. 1983), *petition for cert. docketed*, No. 83-5 (July 11, 1983) (the "Polish Case"):

Nevertheless, it would be a mistake to conclude from the fact that gold no longer plays a role in the international monetary system that all references to gold in the Conven-

²²According to C.A.B. Order 74-1-16, use of the official price of §42.22, which was the last official price in the United States, results in a figure of \$20.00 per kilogram (JA57).

²³Seventeen SDR's per kilogram is the figure proposed by TWA in its calculations at page 35 n. 42 of its Brief. This is the same figure as used in Montreal Protocol No. 4, Art. VII, *done* Sept. 25, 1975, *reprinted in* Lowenfeld, *supra*, at Doc. Supp. 991.

tion may be ignored in calculating the liability limitation and a new measure substituted, whether the current French franc or the SDR. The Warsaw Convention's damage clauses are, in fact, drafted in terms of gold, and they have not as yet been amended to strike that reference. Both the drafting and redrafting of treaties is the business of branches of this government other than the judiciary. Unless and until the damage clauses are redrafted—no matter how logical it may seem to base the calculations upon the French franc, the SDR or any other currency or unit of account—the judiciary does not have the authority to, as plaintiffs correctly state, “read Article 22(4) out of the Convention and *substitute an alternative* method of calculating the damage limit.” (535 F. Supp. at 843; footnote omitted; emphasis in the original.)

Adopting either of TWA's proposals would effectively amend Article 22 to substitute a currency clause for the present gold provision.

Franklin Mint submits that such a radical alteration of the essence of Article 22 also violates the intentions of the Convention's drafters. The legislative history of the Convention shows that the framers rejected a proposal to replace the gold franc by an undefined French franc. The purpose of the gold clause was, in the words of one commentator on the Convention, “to avoid, as far as the limits are concerned, the effects of devaluations which would result from having the limits expressed in any local currency”. H. Drion, *Limitations of Liabilities in International Air Law* 183 (1954).

Using the last official gold price of \$42.22 means using a dollar figure that is forever fixed. Consequently, the value of the Article 22 limit will change not because of any alteration in the value of gold, but because of changes in the worth of the dollar. It is precisely this linking of a claimant's recovery to the fortunes of a currency that the Convention's drafters wished to avoid.

The SDR is no better in this regard, because the SDR is currently nothing more than the weighted average of five currencies.²⁴ If the framers rejected the use of one currency, why should adding another four make a difference?

Contrary to TWA's description of the SDR as a "Rosetta stone" (TWA Brief, p. 35), the fact is that use of the SDR represents a fundamental change in Article 22. This point is shown by the Montreal Protocols of 1975, which specifically amend the Warsaw Convention on this issue. In Montreal Protocol No. 4, which pertains to cargo, the reference to gold in Article 22 is replaced by a reference to SDRs. This change is only for those signatories belonging to the IMF. Nations adhering to the Convention, but not members of the IMF, such as Switzerland or Poland, could, if they wished, continue as before.²⁵

President Ford submitted the Protocols to the Senate in January 1977, and the treaties were reported out of committee subject to a qualified approval. One of the several provisos attached to the committee's approval was that "the United States government shall continue actively to seek to negotiate higher limits on the liability of carriers than those

²⁴These currencies are the American dollar, the English pound, the German mark, the French franc, and the Japanese yen.

TWA emphasizes the desire of the Convention's framers for stability. Yet it is questionable whether such stability can be achieved by utilizing a device, such as the SDR, which is redefined every few years. During the period 1968-74, the SDR was calculated on the basis of gold. From 1974 to January 1978, the SDR was based on the weighted average of sixteen currencies. The identity of the sixteen currencies was not consistent during this period, nor were the weights assigned to the various currencies. Since January 1, 1978, the SDR has been the weighted average of five currencies. Gold, by contrast, has been a medium of exchange and a standard of value for a few thousand years.

²⁵Use of the SDR is criticized in A. Tobolewski, "The Special Drawing Right in Liability Conventions: An Acceptable Solution?" *Lloyd's Mar. & Com. L. Q.* 169 (1979 Part Two). This brief article is reprinted at page A272 of the Joint Appendix submitted to the Court of Appeals.

provided under these Protocols." Senate Executive Report 98-1, at page 8, Committee on Foreign Relations, U.S. Senate, 98th Cong., 1st Sess. (February 10, 1983.)

The Protocols came up for debate and vote on 8 March 1983. Senator Percy, a proponent of the Protocols, asserted that the Protocols were a means of resolving *Franklin Mint* and other cases that reflect "a growing frustration, and even rebellion, by the U.S. court system against the present [Warsaw] system." 129 Cong. Rec. S2277 (daily ed. March 8, 1983) (remarks of Sen. Percy). Nevertheless, the Protocols were soundly rejected by the Senate. 129 Cong. Rec. S2279 (daily ed. March 8, 1983). Apparently, it was the first time since 1960 that a treaty had been rejected by the Senate. "Air Liability Treaty Rejected by Senate," N.Y. Times, March 9, 1983, at D6, col. 5. The Protocols still remain on the Senate calendar, however, because of Senator Baker's request for reconsideration. 129 Cong. Rec. S2279 (daily ed. March 8, 1983).

Hence, there is presently pending before the Senate a treaty that would specifically amend the Warsaw Convention to make the change being requested now by TWA, *i.e.*, use of the SDR. Under the Constitution treaties are to be made by the executive "by and with the Advice and Consent of the Senate". U.S. Const., Art. II, §2. Adoption of TWA's proposal to use the SDR would result in a judicial intrusion into a policy area allocated by the Constitution to the other branches. The Court should not amend the Convention under the guise of interpretation, particularly when the same issue is already before the Senate.

TWA criticizes use of the free-market price of gold because this price is subject to fluctuations.²⁶ The difficulty with this criticism is that it likewise applies to SDR's. TWA fails to ex-

²⁶During oral argument, the Second Circuit, by Judge Oakes, suggested that one way of ameliorating the day-to-day fluctuations in the market price of gold would be to take the average market price over an extended period.

plain the distinction between the acceptable (to TWA) fluctuations in the price of SDRs and the unacceptable gold price fluctuations.

The alternative is picking a conversion factor with absolutely no fluctuations, *i.e.*, \$42.22. The difficulty with this approach is that it creates a rigidity not found in the system as drafted by the Convention's founders.

The key in the phrase "last official price of gold" is the word "last". TWA's preference is to have the valuation of gold fixed for the future according to the state of affairs on 31 March 1978. No matter what happens to the domestic or world economy, passengers and cargo will always be stuck with the figure of \$42.22.²⁷ Such a proposal destroys the flexibility inherent in the Warsaw system and substitutes for it a qualitatively different arrangement.

This point was recognized by the district court in the Polish Case:

To be sure, tying the operation of a dynamic clause of the Warsaw Convention, meant to deal with a changing global economy without the need for constant amendment, to the public policy of the United States, as expressed in its official price of gold at one moment in time, runs the risk

²⁷The effect of inflation is illustrated in the Kennedy Memorandum, *supra* at note 5, at 4 (JA48). In 1934 the limit for a hypothetical 44-pound suitcase was \$330. In 1980 this limit (using the last official price of gold) would be \$400. Yet in purchasing power terms the \$330 in 1934 would be the equivalent of \$1,920 in January 1980.

As shown in the Clare article, *supra*, prior to the par value system created by Bretton Woods, the limit of recovery would fluctuate (except in the United States) based on fluctuations in the local currency. There has been no suggestion that the airlines were unable to deal then with these fluctuations in the limit. Table I in the Clare article shows, for example, that in France over a twenty-year period the limit increased 1420.1% in terms of the local currency.

under some circumstances of itself undermining the intention of the Convention's drafters. (Polish Case, 535 F. Supp. at 844.)

In support of the \$42.22 figure, TWA relies on two CAB documents. The first item is CAB Order 74-1-16, 39 Fed. Reg. 1526 (1974) (JA54), and TWA cites several cases for the proposition that an agency order is entitled to a presumption of validity. While that legal proposition is obviously true as a general rule, Franklin contests its applicability in the present case.²⁸

CAB Order 74-1-16 is based on a factual assumption that no longer is present: the existence of an official price of gold in the United States. With the elimination of an official gold price, the entire foundation upon which Order 74-1-16 is based has been destroyed. The Order, by its very terms, is no longer factually applicable to the current situation.

The CAB itself no longer considers Order 74-1-16 as stating existing policy. This conclusion is shown by three documents submitted to the lower courts. The first item is CAB Order 81-3-143, which is dated March 24, 1981.²⁹ In that Order the CAB was concerned with the passenger limitation of the Convention, which is 125,000 gold francs. At the conclusion of the Order, the Board states "We do not by our statements in this order express any views on the appropriate valuation of 125,000 francs as expressed in terms of gold." If the Board had still considered Order 74-1-16 to state existing policy, then there obviously would have been a reference to Order

²⁸An agency interpretation of a statute that violates the purpose of the statute is not entitled to be followed. *United States ex rel. Dancy v. Arnold*, 572 F.2d 107, 113 (3d Cir. 1978); *National Wildlife Federation v. Snow*, 561 F.2d 227, 238 (D.C. Cir. 1976). The same reasoning is applicable to treaties. See *Deutsche Lufthansa Aktiengesellschaft v. Civil Aeronautics Board*, 479 F.2d 912 (D.C. Cir. 1973).

²⁹This Order is reprinted at page A121 of the Joint Appendix submitted to the Court of Appeals.

74-1-16. Instead, the Board expressly disclaimed any views on the valuation of the gold franc.

The two other CAB items that support Franklin Mint are letters reproduced at pages A362 and A369 of the Joint Appendix that was submitted to the Court of Appeals. In the first letter the chairman of the CAB stated in May 1981 that "The Board has not taken any position on the issue" In a letter of November 1981, the General Counsel of the Board opined that the interpretation of the Convention's liability limit was for the courts to determine. No mention was made of Order 74-1-16.

The other CAB document on which TWA relies is the Golden Memorandum (JA33). Although Mr. Golden recommends maintenance of the status quo, it is not because of any strong belief in the merits of this approach. As he says in the concluding paragraph of his memorandum:

Because of the confusion inherent in converting Warsaw's limits when there is no official rate of gold and the equitable considerations raised by the low limits currently in force, we believe the Board should develop a coherent policy resolution of the questions, and then meet the Departments of Transportation and State to review this problem. These agencies will be solely responsible for enforcing Warsaw in the future and have participated actively in formulating U.S. policy in this area in the past. (JA41)

In fact, in the sentence immediately following the one quoted by TWA in its brief at page 29, Mr. Golden points out the drawback of continued use of the \$42.22 figure: "Use of the last official rate of gold, however may at times prevent passengers from recovering the full extent of damages caused by carriers. Carriers may no longer need the protection of these low limits, given the maturation of the aviation industry since 1929." (JA40-41; footnote omitted.)

TWA also relies on two federal decisions rendered after the Second Circuit's judgment in *Franklin Mint*.³⁰ *Maschinenfabrik Kern, A.G. v. Northwest Airlines, Inc.*, 562 F. Supp. 233 (N.D. Ill. 1983); *Deere & Co. v. Deutsche Lufthansa A.G.*, No. 81 C 4726 (N.D. Ill. Dec. 30, 1982) (not officially reported; set forth at page A-61 of the Appendix to TWA's certiorari petition). Both cases are by federal judges in Chicago, and both defer to the CAB on the matter. Yet in neither case is there any discussion of the CAB material subsequent to Order 74-1-16, in particular the Board's statement in Order 81-3-143 quoted above. Because these decisions are a rubber-stamp approval of an obsolete agency order, they are not entitled to great consideration. See *Federal Maritime Commission v. Seatrain Lines, Inc.*, 411 U.S. 726, 745-46 (1973).

The only other federal decision on this issue post-*Franklin Mint*, is *In re Aircrash at Kimpo International Airport, Korea on November 18, 1980*, 558 F. Supp. 72 (C.D. Cal. 1983), interlocutory review denied, No. 83-8051 (9th Cir. May 10, 1983). That case adopts the Second Circuit's reasoning and applies it retrospectively, as suggested at Point III below.

Finally, TWA relies on a number of foreign decisions.³¹ Both

³⁰TWA also cites *Electronic Memories & Magnetic Corp. v. The Flying Tiger Line, Inc.*, No. 784512 (Cal. Super. Ct., San Francisco Aug. 25, 1982) (set forth at page A-60 of the Appendix to TWA's certiorari petition), which pre-dates the Second Circuit's opinion. The opinion by a California Superior Court consists of four sentences, and the decision is presently on appeal.

³¹TWA has also referred to a 1974 resolution of the Legal Subcommittee of the International Civil Aviation Organization (JA58). That resolution, however, was passed at a time when the "two-tier" gold system was in effect. Hence it is not surprising that preference was given to the official, as opposed to the unofficial, gold price. Furthermore, as one commentator has observed, "Obviously, since the resolution received so few affirmative votes, it could not be relied upon to afford a solution for problems caused by the two-tier gold regime." G. FitzGerald, "The

(Footnote continued on following page)

sides have foreign decisions in their favor, and suffice it to say that there is no international uniformity on the subject. This lack of uniformity is the reason for the drafting of the Montreal Protocols. In addition, the views of an English solicitor are in order:

There are dangers in relying upon decisions of foreign courts in an indiscriminate fashion. Quite apart from possible errors or imperfections in translation where a judgment is in a foreign language, the judgment may reflect legal ideas used in foreign legal systems and essential to the proper understanding of the judgment but alien to those of the reader in another jurisdiction. Furthermore, there are many foreign cases in which the full facts are not described and the law not properly argued. Often the relevant authorities are not cited. There is thus a great danger in treating one or two foreign cases as pointing to the existence of some vaguely constituted international body of case law. Furthermore, the reporting of relevant decisions varies enormously in quality and clarity from country to country as does the inclusion of cases in various digests and periodicals produced on an international basis. It must be emphasized, again and again, that there is no international body of case law in the field of aviation nor, indeed, in any other." (P. Martin, "The price of gold and the Warsaw Convention (III)", 6 Air L. 246 (1981).) ("Martin")

TWA sets forth, for example, two Austrian decisions in the Appendix to its brief on the merits. *Kislinger v. Austrian Air-*

(Footnote continued from previous page)

Four Montreal Protocols to Amend the Warsaw Convention Regime Governing International Carriage by Air," 42 J. Air L. & Com. 273, 324 (1976). As TWA conceded to the district court, "as a practical matter, the effect of the 1974 ICAO Resolution has been eclipsed as a result of the elimination of an official rate of gold, . . ." (TWA Memorandum of Law of 31 July 1981 in Support of Defendant's Motion, at p. 22.)

transport, No. 1 R 145/83 (Commercial Court of Appeals of Vienna, Austria, June 21, 1983) (at BA 12); *Rendezvous-Boutique-Parfumerie Friedrich and Albine Breiting GmbH v. Austrian Airlines*, No. 14 R 11/83 (Court of Appeals of Linz, Austria June 17, 1983) (at BA22). In Austria, however, the legislature had already adopted the SDR into analogous transportation conventions. In the Dutch case cited by TWA, *State of the Netherlands v. Giants Shipping Corp.*, *Rechtspraak van de Week* 321 (May 30, 1981) (Supreme Court of The Netherlands May 1, 1981), a maritime convention was at issue, the so-called Brussels Convention.³² That Convention had been amended by a protocol to provide for the use of SDRs, although the protocol was not yet in effect.

These Austrian and Dutch decisions illustrate precisely what is missing in the case at bar: an expression of public policy by the domestic legislature. The Congress has eliminated an official price of gold. The Senate has refused its advice and consent to the Montreal Protocols. No domestic legislation, as exists in other countries, has been proposed here on the conversion question. As long as Article 22 exists in its present form, it is a gold clause. The only price of gold currently in existence is the free-market price. Consequently, if Article 22 is enforceable, it can only be enforced as written based on the free-market price of gold.

POINT II

Alternatively, Article 22 of the Convention should be held to be unenforceable.

It is useful to contrast the present case with the problem before the courts in *Day v. Trans World Airlines, Inc.*, 393 F. Supp. 217 (S.D.N.Y.), *aff'd*, 528 F.2d 31 (2d Cir. 1975), *cert.*

³²Formally known as the Convention Relating to the Limitation of the Liability of Owners of Sea-Going Ships, done Oct. 10, 1957, reprinted in 6 *Benedict on Admiralty* 5-11 (7th ed. 1983).

denied, 429 U.S. 890 (1976). There the courts were faced with interpreting the meaning of Article 17, which sets temporal limits on the Convention's applicability. The specific question was whether passengers in a boarding line were within the Convention's coverage. The *Day* case illustrates the typical problem of interpretation faced by the courts in applying general statutory language to concrete situations.

In the present appeal there is no dispute as to the translation or the literal meaning of Article 22. Likewise, no one contends that a limit is to be calculated on the basis of the present-day value of a specific French coin that has not been minted since 1936.

The difficulty is rather one of trying to put into terms comprehensible to the 1980's a system based on the assumptions of the 1920's. The key assumption made by the Convention's drafters concerned the use of gold as a standard of value. Gold has been valuable to man for several thousand years, as it still is today. In 1929, however, that value was set by government fiat. Today, there is still an international price of gold, but the price is set by the market. Because the price of gold now is a market price, it can change frequently based on the perceptions of people throughout the world. Hence, while gold still performs its intended role as a standard of value, the price of gold is now set by a method not expected by the drafters for "a Convention which is drawn for a few years" (minutes, *supra*, at 90; JA162.)

It is also useful to contrast the situation normally faced by the Court in interpreting the Constitution. The system created by the Constitution has continued vitality precisely because a general scheme was outlined and broad language (*e.g.*, "due process of law") was used. The Warsaw Convention, on the other hand, is very specific (see, *e.g.*, Article 8). As a vice-president of the Warsaw Conference noted, "If there are improvements to be brought forth, life does not end today, we can do them later on." (Minutes, *supra*, at 32.)

Unfortunately, the Convention has proven very difficult to amend, and the parties' suggestions are all somewhat Procrustean in their effort to jam 1983 realities into the 1929 framework. As the Second Circuit noted, "Indeed, there are powerful arguments against each of the proffered solutions." 690 F. 2d at 305-6; JA195.

Franklin Mint submits that the only valid alternative to the use of the free-market price of gold is a determination that Article 22 is unenforceable as written. This conclusion was the one reached by the Second Circuit, and is a result supported by both the facts and the applicable American law.

The two key facts are that (1) in 1929 Article 22 was premised on the existence of a price of gold established internationally by government action, and (2) since the Jamaica Accords of 1975 and the U.S. repeal of the Par Value Modification Act, there no longer exists a gold price set by statute.

The legal principles applicable to the foregoing facts are straightforward. The interpretation of a treaty is a judicial question. *Sullivan v. Kidd*, 254 U.S. 433, 442 (1921); see also *Baker v. Carr*, 369 U.S. 186, 211-12 (1962); *Society for the Propagation of the Gospel In Foreign Parts v. New Haven*, 21 U.S. (8 Wheat.) 464, 491-94 (1823). A treaty is to be regarded as equivalent to an act of the legislature. *Valentine v. United States ex rel. Neidecker*, 299 U.S. 5, 10-11 (1936); *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 314 (1809) (Marshall, C.J.). A treaty stands no higher than any other legislative act. *Whitney v. Robertson*, 124 U.S. 190, 194 (1888).

Thus it is clear that a treaty may be modified by a subsequent act of Congress. *Moser v. United States*, 341 U.S. 41, 45 (1951). A treaty may be entirely abrogated by a later statute. *Whitney v. Robertson*, 124 U.S. 190, 194-95 (1888); *Edye v. Robertson (The Head Money Cases)*, 112 U.S. 580, 597-99 (1884); *The Cherokee Tobacco*, 78 U.S. (11 Wall.) 616, 620-21 (1870).

The Second Circuit's decision is also supported by international law, which is part of our domestic law. *The Paquete Habana*, 175 U.S. 677 (1900). Under the doctrine of *rebus sic stantibus*, a treaty need not be followed when there has been a substantial change in conditions since the promulgation of the treaty. Restatement, Second, of the Foreign Relations Law of the United States §153 (1962). In view of the radical changes that have occurred since 1929, this doctrine is certainly applicable to the Warsaw Convention.

An English solicitor's conclusion on the gold franc issue was that "It is my strongly held view that there is no or no wholly satisfactory solution to be found by the courts anywhere; the muddle can only be cleared up by effective international legislation." Martin, *supra*, at 249. The Court of Appeals reached a similar conclusion when it said that "selection of a unit of conversion and the level of value of a limitation on liability is plainly a matter to be negotiated by the parties, as the history of the Convention demonstrates." 690 F.2d at 311; JA208. Both the international community and the Congress explicitly abandoned the assumption concerning gold by which Article 22 of the Convention had been interpreted in this country for over forty years. The conclusion of the Court of Appeals that the subsequent Congressional act modified the Warsaw Convention is consequently a decision that is constitutionally valid.

POINT III

Article 22 should be held unenforceable as of 1 April 1978.

Although the Court of Appeals determined that Article 22 was unenforceable because of Congressional action, the appellate court gave this holding only prospective effect. The jus-

tification for this decision was that the court's "resolution was not clearly foreshadowed" (quoting *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106 (1971) and that "[p]arties to transactions covered by the Convention should have time to adjust their affairs to this ruling." 690 F.2d at 312; JA209. The Court should reverse this portion of the Second Circuit's judgment and remand the action to the trial court for a determination of Franklin Mint's damages.

The Court has given prospective effect to its rulings almost exclusively in the context of criminal constitutional rights. See, e.g., *Wainwright v. Stone*, 414 U.S. 21 (1973); *Michigan v. Payne*, 412 U.S. 47 (1973). For these cases the retrospective application of newly established constitutional rights would have had the potential effect of forcing the retrial, or release, of thousands of convicted criminals.

The civil cases on this topic are likewise readily distinguished. For example, in *Cipriano v. City of Houma*, 395 U.S. 701 (1969), the Court held unconstitutional a statute limiting the franchise concerning local bond issues. The ruling was made prospective in consideration of the "significant hardships" that retroactive application would have "imposed on cities, bondholders, and others connected with municipal utilities," where the time for challenging such election results had lapsed. 395 U.S. at 706.

In *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 102 S.Ct. 2858 (1982), the Court concluded that the broad grant of jurisdiction to the bankruptcy courts in the Bankruptcy Act of 1978 is unconstitutional; and this holding was made prospective. The practical effect of a contrary result would have been to invalidate all of the cases filed under the Act. As the Court noted, retroactive application "would surely visit substantial injustice and hardship upon those litigants who relied upon the Act's vesting of jurisdiction in the bankruptcy courts." 102 S.Ct. at 2880.

In *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), the Court listed three considerations as properly bearing upon the issue of retroactivity. 404 U.S. at 106-7; see also *Northern Pipeline Co.*, *supra*, 102 S.Ct. at 2880. The Court of Appeals, however, mentions only one factor in its decision.

The first factor mentioned in *Chevron Oil Co.* is that the decision must establish a new principle of law, either by overruling clear precedent or by deciding an issue of first impression whose resolution was not clearly foreshadowed. 404 U.S. at 106. The present case involves a matter of first impression in the United States; there is no American precedent on the subject.

Nevertheless, at least since the 1974 decision of the Greek appellate court in *Zakoupolos v. Olympic Airways Corp.*, No. 256/74 (Court of Appeal, 3d Dep't. Athens, Greece, January 10, 1974), the airlines have known of their exposure to increased liability because of the uncertainty surrounding Article 22. In a 1981 article IATA's counsel of record noted "However, in recognition of the controversy over the conversion rate for the Warsaw limitation, from 'gold' francs into United States currency, settlement offers may still exceed \$75,000." R. Craft, "Factors Influencing Settlement of Personal Injury and Death Claims in Aircraft Accident Litigation," 46 J. Air L. & Com. 895, 898-99 (1981) (footnote omitted). The very purpose of the Montreal Protocols of 1975 was to eliminate this uncertainty concerning the limitation in the Convention. As stated by the district court in *In re Aircrash at Kimpo International Airport Korea on November 18, 1980*, 558 F. Supp. 72, 75 (C.D. Cal. 1983), *interlocutory review denied*, No. 83-8051 (9th Cir. May 10, 1983):

It is clearly established that the airlines knew that "a rational limit on liability cannot exist" without an internationally agreed upon unit and "the Montreal meeting in 1975 was a recognition by the Warsaw parties that the Convention's unit had been eliminated." Therefore, air-

lines, including Korean, presumptively knew that this "international disarray" would prevent the Convention from shielding them in any rational manner, and they would be expected to protect themselves and obtain additional insurance.

Furthermore, the knowledge of this "international disarray" and the "recognition by the Warsaw parties that the Convention's unit had been eliminated by events," contrary to the holding in *Franklin Mint*, would allow the airlines to see—as early as 1975—that, eventually, a court would refuse to enforce the Convention. Therefore, this Court's decision as to the enforceability of the Convention is applicable to this action.

The second factor mentioned in *Chevron Oil Co.* is whether retrospective operation will further or retard the operation of the holding in question. 404 U.S. at 106-7. If the Court determines that Article 22 is unenforceable, the basis for that decision must rest on the fact that since 1 April 1978 there is no longer a price of gold set by statute. It makes no sense to reach a decision founded on the significance of that date, yet also to hold that only future cases are affected by this change in the controlling facts. Either the state of affairs was different after 1 April 1978, or it was not. If it was different, then the only way to give full effect to the Court's decision is to make a holding on unenforceability effective as of 1 April 1978.

The final factor is whether retroactive application could produce substantial inequitable results in individual cases. 404 U.S. at 107. In *Chevron Oil Co.*, for example, giving retrospective effect to the pertinent holding would have meant that the plaintiff's claim would have been time-barred. In the present case, not giving retrospective effect would mean limiting TWA's admitted liability (JA15) to about 2.5% of Franklin Mint's claimed damages.

A retrospective ruling in favor of claimants under the Con-

vention will not result in the chaos envisioned in either *Northern Pipeline Co.* or the criminal cases, because Article 29 of the Convention establishes a two-year statute of limitations. A retrospective ruling by the Court would therefore, as a practical matter, affect only pending cases and causes of action that have arisen within the last two years. In view of the uncertainty concerning Article 22 since the mid-1970's, there is no reason, either in equity or in logic, why air carriers (or their liability insurers) should reap the benefit of the international disarray.

This Court stated the matter in *United States v. Donnelly*, 397 U.S. 286, 294-5 (1970):

Acts of Congress are generally to be applied uniformly throughout the country from the date of their effectiveness onward. Generally the United States, like other parties, is entitled to adhere to what it believes to be the correct interpretation of a statute, and to reap the benefits of that adherence if it proves to be correct, except where bound to the contrary by a final judgment in a particular case.

If Franklin Mint is correct in Point II of this Brief that Article 22 is unenforceable, then the Court's ruling should be applicable as of 1 April 1978, the date when the statutory relationship between gold and the dollar was abandoned.

CONCLUSION

For all the foregoing reasons the Judgment of the United States Court of Appeals for the Second Circuit should be reversed and the action remanded to the District Court. Upon remand the District Court should determine, and enter judgment for, the actual amount of Franklin Mint's damages. Alternatively, the District Court should enter judgment for Franklin Mint for the lower of two amounts that are to be determined by the District Court: (1) the limit of TWA's liability using the free-market price of gold on the date of the carriage contract's breach, and (2) Franklin Mint's actual damages.

Dated: New York, New York
October 12, 1983

Respectfully submitted,

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APPENDIX

Article 22 of the Warsaw Convention

CONVENTION FOR UNIFICATION OF CERTAIN RULES RELATING TO INTERNATIONAL TRANSPORTATION BY AIR

Article 22

(1) In the transportation of passengers the liability of the carrier for each passenger shall be limited to the sum of 125,000 francs. Where, in accordance with the law of the court to which the case is submitted, damages may be awarded in the form of periodical payments, the equivalent capital value of the said payments shall not exceed 125,000 francs. Nevertheless, by special contract, the carrier and the passenger may agree to a higher limit of liability.

(2) In the transportation of checked baggage and of goods, the liability of the carrier shall be limited to a sum of 250 francs per kilogram, unless the consignor has made, at the time when the package was handed over to the carrier, a special declaration of the value at delivery and has paid a supplementary sum if the case so requires. In that case the carrier will be liable to pay a sum not exceeding the declared sum, unless he proves that that sum is greater than the actual value to the consignor at delivery.

(3) As regards objects of which the passenger takes charge himself, the liability of the carrier shall be limited to 5,000 francs per passenger.

(4) The sums mentioned above shall be deemed to refer to the French franc consisting of 65½ milligrams of gold at the standard of fineness of nine hundred thousands. These sums may be converted into any national currency in round figures.

Par Value Modification Act

Pub. L. No. 92-268, § 2, 86 Stat. 116, 117 (1972):

SEC. 2. The Secretary of the Treasury is hereby authorized and directed to take the steps necessary to establish a new par value of the dollar of \$1 equals one thirty-eighth of a fine troy ounce of gold. When established such par value shall be the legal standard for defining the relationship of the dollar to gold for the purpose of issuing gold certificates pursuant to section 14(c) of the Gold Reserve Act of 1934 (31 U.S.C. 405b).

Pub. L. No. 93-110, § 1, 87 Stat. 352 (1973):

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,
That the first sentence of section 2 of the Par Value Modification Act is amended by striking out the words "one thirty-eighth of a fine troy ounce of gold" and inserting in lieu thereof the following: "0.828948 Special Drawing Right or, the equivalent in terms of gold, of forty-two and two-ninths dollars per fine troy ounce of gold".

Bretton Woods Agreements Act of 1976, Pub. L. No. 94-564, § 6, 90 Stat. 2660, 2661 (1976):

SEC. 6. Section 2 of the Par Value Modification Act (31 U.S.C. 449) is hereby repealed.

Designation of Corporate Relationships

Franklin Mint Corporation, Franklin Mint Limited, and McGregor, Swire Air Services Limited, filing their brief on the merits in this consolidated proceeding, state that:

1. This is their first amended Designation of Corporate Relationships.

2. Franklin Mint Corporation is a subsidiary of Warner Communications, Inc.

3. Franklin Mint, Limited is a subsidiary of Warner Communications, Inc. (U.K.), which is in turn a subsidiary of Warner Communications, Inc.

4. McGregor, Swire Air Services Limited, presently known as McGregor Sea & Air Services, Ltd., is a subsidiary of Ocean Cory, Ltd., which is in turn a subsidiary of Ocean Transport & Trading plc.

5. Affiliates and subsidiaries of Franklin Mint Corporation and Franklin Mint, Limited are:

- Atari, Inc.
- Atlantic Records
- WEA Manufacturing
- Warner Bros.
- Panavision
- DC Comics
- Warner Cosmetics
- Warner Amex Cable Communication
- Elektra/Asylum/Nonesuch Records
- Warner Special Products
- Warner Bros. Television
- Warner Home Video
- Mad Magazine
- Warner Software, Inc.

Designation of Corporate Relationships

Cosmos Soccer
Warner Amex Satellite Entertainment Co.
Malibu Grand Prix
Warner Bros. Records
WEA International
Warner Bros. Music Publishing
Licencing Corp. of America
Warner Books
Warner Publisher Services
Warner Theatre Prods.

6. Affiliates and subsidiaries of McGregor, Swire Air Services Limited are:

McGregor Uyeno K.K.
Calayan Co., Ltd.
McGregor Swire Air Services (Malaysia) Sdn. Bhd.
G.E. Green & Co. Pty., Ltd.
MSAS SRL
Society Francaise Wm. Cory et Fils
MSAS Transport GmbH

NOV 10 1983

WILLIAM L. STEVENS,
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1983

TRANS WORLD AIRLINES, INC.,

Petitioner,

—v.—

FRANKLIN MINT CORPORATION, FRANKLIN MINT LIMITED,
and MCGREGOR, SWIRE AIR SERVICES LIMITED,
Respondents.

FRANKLIN MINT CORPORATION, FRANKLIN MINT LIMITED,
and MCGREGOR, SWIRE AIR SERVICES LIMITED,
Petitioners,

—v.—

TRANS WORLD AIRLINES, INC.,

Respondent.

ON WRITS OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF OF TRANS WORLD AIRLINES, INC.

Petitioner in No. 82-1186 and

Respondent in No. 82-1465

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TRANS WORLD AIRLINES, INC.,

Respondent.

ON WRITS OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF OF TRANS WORLD AIRLINES, INC.

Petitioner in No. 82-1186 and

Respondent in No. 82-1465

PRELIMINARY STATEMENT

Trans World Airlines, Inc. ("TWA"),¹ petitioner in No. 82-1186 and respondent in No. 82-1465, respectfully submits this Reply Brief in response to the brief of Franklin Mint

¹ In compliance with Rule 28.1 of this Court, TWA states that as of the date hereof 81.34 percent of its common shares are owned by Trans World Corporation and 18.66 percent of its shares are publicly held.

Corporation, Franklin Mint Limited and McGregor, Swire Air Services Limited (collectively "Franklin Mint"). TWA also responds herein to the arguments of *amici curiae*, Boehringer Mannheim Diagnostics, Inc. ("Boehringer") and Mark Hammerschlag and Ellen van Fleet (collectively "Hammerschlag"), to the extent that they raise issues not covered by Franklin Mint.

ARGUMENT

POINT I

CONSTITUTIONAL CONSIDERATIONS MANDATE THAT THE WARSAW CONVENTION'S LIMITATION OF LIABILITY PROVISIONS CONTINUE TO BE ENFORCED BY THE JUDICIARY

As TWA demonstrated in its Main Brief, it is clearly beyond the province of the judiciary to abrogate treaties, that power having been constitutionally lodged in the political branches of the Government. (TWA Main Brief at 15-16). Therefore, since neither Franklin Mint nor its *amici* supporters have been able to point to an act of Congress specifically declaring the Warsaw limitation provisions unenforceable, and since the executive branch is presently before this Court urging that those provisions be enforced, there is absolutely no basis for sustaining the Second Circuit's declaration that the Warsaw limitation provisions are prospectively unenforceable in the United States. Predictably, Franklin Mint and its *amici* supporters disagree.

In an effort to support that disagreement Franklin Mint and its *amici* offer essentially three arguments: (i) that by repealing the Par Value Modification Act, which set the official price for gold in the United States, Congress effectively abrogated the Warsaw limitation provisions; (ii) that the doctrine of *rebus sic stantibus*, unmentioned by the Second Circuit, supports nullification of the treaty provisions in question; and (iii) that a variety of policy considerations, all of which boil down to the

contention that the existing Warsaw limits of liability are too low, should lead this Court to set those limits aside.

As will be demonstrated below, all of Franklin Mint's and the *amici*'s contentions are totally without merit.

The Repeal of the Par Value Modification Act Had No Effect Upon the Warsaw Limitation Provisions—The Last Official Price of Gold Continues to Be Used for a Variety of International Purposes

In an effort to support their contention that congressional repeal of the Par Value Modification Act was tantamount to a legislative abrogation of the Convention's limitation provisions, Franklin Mint and the *amici* recite various rules of law which, while undoubtedly correct, simply do not lead to the result they seek. Thus, they note that courts have both the authority and the responsibility to interpret treaties (e.g., *Cook v. United States*, 288 U.S. 102 (1933)); that an act of Congress may supersede a prior treaty (e.g., *The Cherokee Tobacco*, 78 U.S. (11 Wall.) 616 (1871)); and that a treaty is the equivalent of an act of legislation (e.g., *Reid v. Covert*, 354 U.S. 1 (1957)). However, Franklin Mint and its *amici* totally ignore the equally well settled rule that "[a] treaty will not be deemed to have been abrogated or modified by a later statute unless such purpose on the part of Congress has been clearly expressed." *Cook v. United States*, 288 U.S. at 120. See also cases cited in TWA's Main Brief at 16. Since the repeal of the Par Value Modification Act makes absolutely no reference to the Warsaw Convention, under the rule in *Cook* it simply cannot be found to have abrogated the Convention's limitation of liability provisions.

Amicus Hammerschlag attempts to overcome the *Cook* infirmity by relying upon *Reid v. Covert*, 354 U.S. at 18 n.34, and *Whitney v. Robertson*, 124 U.S. 190 (1888), which held that if a treaty and a statute are inconsistent, "the one last in date will control the other." 124 U.S. at 194. However, Hammerschlag fails to deal with the fact that use of the last official price of gold as the conversion factor is not inconsistent with

the repeal of the Par Value Modification Act. The history of the legislation repealing that act clearly indicates that Congress contemplated the continued use of the last official price of gold. Senate Comm. on Foreign Relations, Bretton Woods Agreements Act (the "Repeal Act"), S. Rep. No. 1148, 94th Cong., 2d Sess. 12-13 (1976), *reprinted in* 1976 U.S. Code Cong. & Ad. News 5935, 5947.²

Moreover, Hammerschlag's contention that the various present uses for the last official price of gold have no practical transactional significance is simply wrong. (Hammerschlag Brief at 12). Similar to the Warsaw limitation provisions, the Articles of Agreement of the International Bank for Reconstruction and Development (the "World Bank"), the Inter-American Development Bank and the Asian Development Bank employ a specified weight and fineness of gold as the unit of account for payment of subscription obligations. However, they use the United States gold dollar rather than the Poincare gold franc as a shorthand for the weight and fineness of the gold in question. Significantly, the United States pays its obligations to those organizations by converting the gold provisions of their Articles of Agreement into present United States dollars based upon the last official price of gold. For example, payments employing the last official price of gold as a conversion factor were made to the World Bank on December 22, 1978, May 22, 1980, January 19, 1981, February 24,

² In addition, even if it were possible to conclude that the repeal of the Par Value Modification Act might be read to be inconsistent with the continued use of the last official price of gold as the conversion factor, Hammerschlag's argument could not prevail. As equally well-settled as the rule in *Reid v. Covert* is the rule that two statutes (or a treaty and a statute) which may be construed both consistently and inconsistently *must* be construed in such a manner as to give effect to both. See, e.g., *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 155 (1976). Therefore, since the repeal of the Par Value Modification Act may clearly be construed to be consistent with the continued use of the last official price of gold as the Warsaw conversion factor, Hammerschlag's reliance upon *Reid v. Covert* is misplaced.

1982, and December 1, 1982.³ (See TWA Main Brief at 17-18; United States Brief at 24-25).

In short, the rule in *Cook v. United States* requires specific and unambiguous legislative intent to abrogate a treaty. When that rule is considered together with the legislative history of the repeal of the Par Value Modification Act (which makes no mention of the Warsaw Convention⁴ and contemplates the *continued use* of the last official price of gold as an international unit of account) and the fact that the United States *continues* to use the last official price of gold as an international conversion factor, it can hardly be contended that the repeal in any way affected the Warsaw limitation provisions.

Rebus Sic Stantibus

Without citing a single case in direct support of their position, Franklin Mint and Hammerschlag argue that the doctrine of *rebus sic stantibus* may be employed in order to set aside the Warsaw limitation provisions. (Franklin Mint Brief at 40; Hammerschlag Brief at 14-15). Thus, they contend that there is an accepted rule of international law which provides that "a treaty need not be followed where there has been a substantial change in conditions since the promulgation of the treaty." (Franklin Mint Brief at 40). That argument is flawed in three respects: (i) the doctrine is at best a questionable rule of international law; (ii) the United States Government has pub-

³ Counsel for TWA has been advised of the above-mentioned payments, and the dates thereof, by the United States. The source of this information is Russell L. Munk, Esquire, Assistant General Counsel for International Affairs, Department of the Treasury.

⁴ The failure of the legislative history to make reference to the Warsaw Convention is not surprising. As TWA demonstrated in its Main Brief, the Warsaw Convention is a self-executing treaty which required no enabling legislation (TWA Main Brief at 19; *see also* United States Brief at 16). Therefore, despite Hammerschlag's protestations to the contrary (Hammerschlag Brief at 18 n.24), the Par Value Modification Act was never directly tied to the effectiveness of the Warsaw Convention.

licly questioned the existence of the doctrine as a clearly defined concept; and (iii) in any event, use of the doctrine is limited to the executive branch of the Government.

Despite Franklin Mint's and Hammerschlag's arguments, "the existence of [the *rebus sic stantibus*] doctrine as a rule of international law has scarcely been established." Briggs, *The Attorney General Invokes Rebus Sic Stantibus*, 36 Am. J. Int'l L. 89, 90 (1942). Indeed, it has been questioned by the United States at meetings of the International Law Commission.⁵

In addition, to the extent that the doctrine of *rebus sic stantibus* may be invoked at all, it may be invoked only by the executive. See *Hooper v. United States*, 22 Ct. Cl. 408 (1887), in which the court took pains to clarify that it is not the judiciary but the executive which is empowered to annul a treaty. Indeed, section 153 of the Restatement (Second) of Foreign Relations Law of the United States (1965), the only authority upon which Franklin Mint bases its *rebus sic stantibus* argument, makes clear that the application of the doctrine is solely an executive prerogative.

Comment c to section 153 of the Restatement provides:

Requirements applying to party invoking doctrine. The principle of *rebus sic stantibus* does not give a party a right unilaterally to free itself from the obligations of an agreement by acting in a manner inconsistent with its purposes. A party believing that a change which has occurred is of such importance that it may suspend or terminate its obligations must, in the first instance, show its good faith by seeking the concurrence of the other

⁵ Thus, the United States has stated:

The concept of *rebus sic stantibus* embodied in the present article appears to the United States Government to have long been recognized to be of so controversial a character and so liable to the abuse of subjective interpretation that it has reservations about the incorporation of the concept in the draft articles, at any rate in its present form. (Fifth Report on the Law of Treaties, [1966] 2 Y.B. Int'l L. Comm'n 1, 40, U.N. Doc. A/CN.4/183/SER.A/1966/& Add.1-4).

party or parties, unless the circumstances make this impossible or obviously futile.

Since a party seeking to be relieved of its obligation pursuant to the doctrine must first seek the concurrence of the other parties to the treaty and since there is no doubt that, at least in terms of the United States Government, the only branch which deals directly with foreign governments is the executive, only that branch may invoke the doctrine.⁶

Franklin Mint's and the *Amici's* Policy Arguments

The remainder of Franklin Mint's and the *amici's* arguments relating to the unenforceability of the Warsaw limitation provisions are based upon a series of "policy" contentions. Included among those arguments are the claim that the Warsaw Convention is "an anachronism" since among the reasons for its passage was the encouragement and protection of the infant

⁶ Significantly, the sole United States authority which appears to be unequivocally in favor of the doctrine of *rebus sic stantibus* relates to an executive act. That authority is the opinion of then Acting Attorney General Francis Biddle concerning President Roosevelt's suspension of the International Load Line Convention of 1930 during World War II. Quite apart from the special circumstances attendant to that opinion arising from a global conflict, which are obviously not applicable here, even Attorney General Biddle noted that ordinarily a state which relies upon the principle of *rebus sic stantibus* should request agreement of other parties to the treaty. 40 Op. Att'y Gen. 119, 123 (1941). Thus, he was necessarily of the view that the doctrine of *rebus sic stantibus* can only be relied upon by the executive. See also Statement by Secretary of State Acheson, 25 Dep't St. Bull. 647 (1951) (released to the press Oct. 10, 1951), in connection with negotiations for a revision of the Anglo-Egyptian Treaty of 1936:

The U.S. Government believes that proper respect for international obligations requires that they be altered by mutual agreement rather than by unilateral action of one of the parties.

Indeed, Article 39(2) of the Warsaw Convention itself specifically requires a signatory desiring to withdraw from the Convention to give its treaty partners six months' notice. Obviously, no such notice was given here.

aviation industry (Franklin Mint Brief at 8-12; Hammerschlag Brief at 23-24); the claim that the United States has sought to secure higher recoveries for airline passengers (Franklin Mint Brief at 13-15; Hammerschlag Brief at 23-25); and the claim that, as a result of the foregoing contentions, the Convention's limitation of liability provisions are too low and therefore unfair to air passengers and the shippers of air freight.⁷

Although Franklin Mint and the *amici* rely heavily upon such "policy" arguments, it is submitted that they are totally irrelevant. Such contentions improperly invite the Court to determine whether to abrogate the limitation provisions of the

⁷ As demonstrated in the accompanying text, the issue of whether the limits are too low is totally irrelevant to the issue of whether those limits must be judicially enforced. Nevertheless, it should be noted that Franklin Mint's and the *amici*'s contentions concerning the adequacy of the Convention's limits are open to substantial question.

With respect to cargo, the limit, based upon the last official price of gold, is \$20 per kilogram, or \$9.07 per pound. That limit is equal to or higher than the limits of liability for cargo shipped by domestic air transport, which is not governed by the Warsaw Convention. In fact, liability for domestic cargo is often as low as \$0.50 per pound or about \$1.10 per kilogram. (Affidavit of William H. Clarke, Director-Cargo Planning for TWA (set forth in the Joint Appendix submitted to the Court of Appeals at A305)). Moreover, the Montreal Protocols provide for a limit of liability for lost or damaged cargo of 17 SDRs, or approximately \$20, per kilogram.

The Warsaw limit of liability for death and personal injury is actually set by the Montreal Agreement of 1966, not Article 22 of the Warsaw Convention. That Agreement provides for absolute liability for damages up to \$75,000, which amount is expressed not in terms of gold but in terms of United States dollars. The Montreal Protocols, considered by the Senate last year, also provide for absolute liability for death and personal injury and would increase the limit to approximately \$317,000 (\$100,000 in SDRs plus \$200,000 from a supplemental compensation plan). In addition, the Senate is presently considering a supplemental compensation plan which, while leaving absolute liability for death and personal injury in place, would permit full recovery of economic damages for such injuries without limitation. See Letter from Paul R. Ignatius, President of the Air Transport Association of America, to Secretary of State George P. Schultz (Sept. 22, 1983).

treaty based upon its own views of appropriate policy, as if the Warsaw limits were judge-made common law rather than a treaty obligation of the United States. See *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618 (1978). As this Court only recently observed in *Northwest Airlines, Inc. v. Transport Workers Union*, 451 U.S. 77, 95 (1981):

[T]he federal lawmaking power is vested in the legislative, not the judicial, branch of government; therefore, federal common law is "subject to the paramount authority of Congress." *New Jersey v. New York*, 283 U.S. 336, 348.¹⁴

* * *

¹⁴ . . . [T]he task of the federal courts is to interpret and apply statutory law, not to create common law. (Citations omitted).

Thus, it has long been settled law that this Court does "not sit as a super-legislature to weigh the wisdom of legislation nor to decide whether the policy which it expresses offends the public welfare." *Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421, 423 (1952). Since this Court is " 'not concerned . . . with the wisdom, need, or appropriateness of the legislation' " ⁸ [*Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963) (quoting *Olsen v. Nebraska ex rel. Western Reference & Bond Ass'n*, 313 U.S. 236, 246 (1941))], it can hardly be concerned with whether it agrees with the levels of liability set by the Convention's signatories.

In view of the foregoing, Hammerschlag's complaint that the United States' *amicus* brief, supporting the use of the last official price of gold as the Warsaw conversion factor, is a change from prior positions taken by the United States Government is clearly misplaced. There is no inconsistency between the political branches' various attempts to raise the Warsaw

⁸ As Franklin Mint and its *amici* have pointed out, for purposes of judicial interpretation, the rules which apply to domestic legislation are equally applicable to treaties. See, e.g., *Reid v. Covert*, 354 U.S. 1 (1957), relied upon in the Hammerschlag Brief at 9.

limits for death and injury (but not cargo) via the appropriate route of international conventions and diplomacy (described in the Franklin Mint Brief at 13-15) and the Government's *amicus* position before this Court—that the judicial branch must enforce the Convention, a valid and binding treaty, as it presently exists.

In sum, this Court's primary duty with respect to treaties is to ensure that the United States fulfills the international obligations which the political branches have undertaken. Whether it is in the best interests of the United States to adhere to a treaty which provides for limited, but certain, recovery for "victims of air crashes" (a question raised in the *Hammer-schlag* Brief at 13) is a decision to be made by the political branches of the Government, not by this Court. To hold otherwise would not only violate the separation of powers doctrine embedded in the Constitution but would also, as a practical matter, severely hamstring the political branches in their efforts to carry out their delicate foreign policy duties. (See United States Brief at 2-3).

POINT II

THE FREE MARKET PRICE OF GOLD IS AN INAPPROPRIATE CONVERSION FACTOR FOR THE WARSAW LIMITATION PROVISIONS—THE MOST APPROPRIATE CONVERSION FACTOR IS THE LAST OFFICIAL PRICE OF GOLD

Franklin Mint and its *amici* contend that the use of the free market price of gold as the Warsaw unit of conversion is supported by three factors: (i) the text of the treaty; (ii) the prior practice in this country; and (iii) the intentions of the Convention's drafters. As demonstrated below, these factors simply do not lead to the conclusion which Franklin Mint suggests. To the contrary, when they are considered together with the canons of treaty construction, it becomes clear that the last official price of gold is the most appropriate unit of conversion.

The Text of the Treaty Does Not Support Use of Market Price

Franklin Mint's contention that a literal reading of the Convention supports its position begs the question before the Court. There is no doubt that the treaty provides for the use of gold; the question presently at bar is what gold value should be employed. Therefore, a simple reading of the treaty, literal or otherwise, does nothing to further elucidate the issue.

In fact, the language of the Convention clearly supports the use of the last official price of gold. Thus, in *In re Air Crash Disaster at Warsaw, Poland, on March 14, 1980*, 535 F. Supp. 833 (E.D.N.Y. 1982), *aff'd on other grounds*, 705 F.2d 85 (2d Cir. 1983), *cert. denied*, 52 U.S.L.W. 3264 (U.S. Oct. 3, 1983)(No. 83-5)(the "*Polish Case*"), the court specifically relied upon the "references to gold in the Convention" in support of its conclusion that the last official price of gold is the appropriate conversion factor. 535 F. Supp. at 843.

Indeed, as Franklin Mint's own authorities demonstrate, the last official price of gold is the appropriate conversion factor. The decision of the Permanent Court of International Justice (the "PCIJ") in *Serbian Loans*, 1929 P.C.I.J., ser. A, Nos. 20/21, *reprinted in* 2 World Ct. Rep. 344 (M. Hudson ed. 1935), *discussed in* G. Hackworth, 5 Dig. Int'l L. 630-35 (1943), to which Franklin Mint refers (Franklin Mint Brief at 20), underscores the fact that the drafters intended the gold value provisions to be read as referring to a stable unit of account, not to a precious metal. That case, decided in the year Warsaw was signed, involved the interpretation of various international loan agreements providing for payment based upon the gold franc. In construing those agreements, the PCIJ held: "It is manifest that the Parties, in providing for gold payments, were referring, not to payment in gold coins, but to gold as standard of value." *Serbian Loans*, 2 World Ct. Rep. at 365.

Practice in This Country Supports the Use of the Last Official Price of Gold as the Conversion Factor

Franklin Mint's arguments concerning the prior "practice in this country" are also wide of the mark. (Franklin Mint Brief at 21 *et seq.*). All that Franklin Mint's arguments under this rubric really suggest is that since ratifying the Convention it has been the practice in the United States to convert the Warsaw gold provisions according to the official price of gold and that since the United States' adherence to the Convention the official price of gold has risen from \$35.00 to \$42.22 per troy ounce. Franklin Mint then argues that this slight upward rise in the official price of gold provided a flexibility in the unit of conversion which would be lost if the limit is set at the last official price of gold, \$42.22 per troy ounce.

The answer to Franklin Mint's "prior practice argument" is simple. It is TWA which urges continuation of the long-established practice in this country of employing the official price of gold as the Warsaw conversion factor; it is Franklin Mint which seeks to depart from prior practice in the United States. The response to Franklin Mint's flexibility contention is equally clear. The use of market price would not result in flexibility—it would result in chaos. Moreover, the "flexibility" to which Franklin Mint refers arose out of legislative acts which, from time to time, fixed the official price of gold. If the last official price of gold is employed as the conversion factor, it would in no way preclude future legislative acts, such as ratification of the Montreal Protocols or such future protocols as may be agreed upon by the signatories, from supplying the flexibility which Franklin Mint asserts is so desirable.

The Intent of the Drafters Also Leads to the Use of the Last Official Price of Gold

Franklin Mint's final argument in support of the use of the free market price of gold turns upon the claim that it was "the intention of the Convention's drafters to 'protect against inflation by linking the limits to the real value of gold.' " (Franklin Mint Brief at 24-25). The difficulty with this argu-

ment is that the use of the free market price of gold would, in fact, substantially undercut the primary purpose of the Convention's drafters—to set stable and predictable limits of liability.⁹ As the court observed in the *Polish Case*:

The signatories of the treaties looked to gold to avoid fluctuations in the limitations, since gold had a constant value and the currencies of the various nations were subject to unilateral alterations for reasons wholly unrelated to air carriers' liability. This constancy and stability, upon which the parties to the treaties relied, cannot be achieved if the fair market value of gold is used for the calculations. To substitute the fluctuating price of the commodity gold for the relatively fixed and certain price of an international monetary unit does, as defendant suggests, directly contravene the intentions of all those who adopted the treaties. For this reason, such a substitution is clearly inappropriate, and plaintiffs' suggestion that the fair market value of gold be the basis for the conversion must be rejected. (*Polish Case*, 535 F. Supp. at 842-43 (footnote omitted)).

Moreover, Franklin Mint's suggestion that use of the market price of gold would result in a conversion factor tied to inflation is simply wrong. At present, the market price of gold is not an economic indicator at all but only "a volatile commodity, not related to a price index, or to the rate of inflation." A. Lowenfeld, *Aviation Law* § 6.51, at 7-169 (2d ed. 1981).

In sum, the overriding purpose of Article 22 was to provide stable and predictable limits of liability—a purpose which would be totally thwarted by the use of the market price of gold.

⁹ The use of the free market price of gold would create such unstable limits of liability that, as even *amicus* Boehringer admits, an extraordinarily sophisticated computer arrangement would be necessary to determine, at any given moment, just what the limits are. (Boehringer Brief at 16-17). The wild fluctuations of the market price of gold are illustrated by the graph at JA29.

**Franklin Mint Has Failed to Respond to TWA's
Demonstration That the Last Official Price of Gold
Is the Most Appropriate Conversion Factor**

Franklin Mint offers two arguments against the use of the last official price of gold—that use of the last official price will result in a limit which is “forever fixed” (Franklin Mint Brief at 29) and that Civil Aeronautics Board (the “CAB”) Order 74-1-16 has been sapped of its vitality (Franklin Mint Brief at 33). Both of these contentions are clearly wrong.

The flaws in Franklin Mint's claim that use of the last official price of gold would result in limits which are “forever fixed” have already been demonstrated. (*See supra* p. 12). In short, whatever flexibility existed in the past was a result of legislative acts; use of the last official price of gold as the conversion factor would in no way preclude future legislative action with respect to the Warsaw unit of account.

Franklin Mint's attack upon CAB Order 74-1-16 is equally ineffective. Although Franklin Mint argues that the CAB itself no longer considers Order 74-1-16 as existing policy (Franklin Mint Brief at 33), the fact remains that the CAB has effectively endorsed the continued use of the last official price of gold as the unit of conversion. This is so because all United States air carriers are required to file their international tariffs with the CAB (*see* Federal Aviation Act of 1958, § 403(a), 49 U.S.C. § 1373(a) (1976)), and they have continued to file using the last official price of gold. Since the CAB has ordered this procedure, has not modified that Order and has not objected to such filings, it in fact continues to endorse the last official price of gold as the medium of conversion. Indeed, the Code of Federal Regulations presently *requires* international air carriers to inform passengers and shippers of the Warsaw limits in terms of United States currency based upon the last official price of gold as the conversion factor. 14 C.F.R. § 221.176 (1983).

Finally, Franklin Mint's suggestion that CAB Order 81-3-143 somehow undercuts the continued vitality of Order 74-1-16 is simply incorrect. (Franklin Mint Brief at 33). Order 81-3-143 (Application of British Caledonian Airways Limited (adopted

March 24, 1981)(set forth in the Joint Appendix submitted to the Court of Appeals at A121)) is a declaratory order ruling upon a single filing by a single airline—it does not purport to affect Order 74-1-16. In fact, its only effect was to permit a British air carrier to file its tariff in terms of SDRs, consistent with British legislation.¹⁰

In sum, for the reasons set forth in TWA's Main Brief, the last official price of gold is the most appropriate conversion factor for the Warsaw limitation of liability provisions. Unlike the market price of gold, it is totally consistent with the objectives and purposes of the Convention's drafters.

POINT III

SPECIAL DRAWING RIGHTS ARE AN ALTERNATIVE CONVERSION FACTOR

In its Main Brief, TWA demonstrated that SDRs are an appropriate alternative conversion factor for the Warsaw Convention's limitation provisions. (TWA Main Brief at 30-37). In the face of that demonstration, Franklin Mint and its *amici* supporters contend that SDRs are inappropriate for four reasons: (i) that SDRs would offend the text of the Convention (Franklin Mint Brief at 28); (ii) that SDRs must be rejected because they are valued upon the basis of a weighted average of five currencies (Franklin Mint Brief at 30); (iii) that the use of SDRs would result in a "judicial intrusion" into the sphere of the political branches (Franklin Mint Brief at 31); and (iv) that SDRs are subject to fluctuations in value (Franklin Mint Brief at 31-32). Each of Franklin Mint's contentions will be considered briefly.

Franklin Mint's contention that the use of SDRs is barred by the language of the Convention ignores the rule that in effec-

¹⁰ This tariff is similar to the Montreal Agreement in that it relates only to death or personal injury and voluntarily sets a limit which is higher than that contained in the Convention. It leaves unaffected British Caledonian's liability for cargo, which continues to be approximately \$20 per kilogram.

tuating the drafters' intent, the courts must not permit a treaty's language to become a "verbal prison." A change in circumstances may not be permitted to defeat a treaty's original purpose, even if this requires a departure from the letter of the treaty provision in question. See *Eck v. United Arab Airlines, Inc.*, 360 F.2d 804, 812 (2d Cir. 1966); *Day v. Trans World Airlines, Inc.*, 528 F.2d 31, 35 (2d Cir. 1975), cert. denied, 429 U.S. 890 (1976). (See also TWA Main Brief at 34-35).

Equally superficial is Franklin Mint's contention that SDRs must fail because they are "nothing more than the weighted average of five currencies" (Franklin Mint Brief at 30). Irrespective of how they are valued, SDRs are the modern-day international unit of account. They are frequently referred to as "paper gold" and to a large extent have taken the place of gold in the international economic system (see TWA Main Brief at 30-31). In addition, since the subsequent conduct of the signatories may be considered for purposes of construing the Convention (see, e.g., *Day v. Trans World Airlines, Inc.*, 528 F.2d at 36 n.15), SDRs are particularly appropriate for use as the Warsaw conversion factor; the signatories have recently selected them as the unit of conversion in the Montreal Protocols.

Franklin Mint's "judicial intrusion" argument is also flawed. By adopting SDRs as the unit of account for the Warsaw gold provisions, the Court would not be adopting the Montreal Protocols, which contain a variety of provisions, but merely the unit of account which those Protocols also happen to employ. The Supreme Court of the Netherlands, albeit in the context of the Brussels Convention, has already effectively so held. (TWA Main Brief at 32-35). Moreover, adoption of SDRs would be in accord with Article 18 of the Vienna Convention on the Law of Treaties (*opened for signature* May 23, 1969, *reprinted in* 8 I.L.M. 679, 686 (1969)). Under that Article, the United States' signing of the Montreal Protocols places it under an obligation to avoid undermining them during the ratification process. (See TWA Main Brief at 30 n.37).

Franklin Mint's final criticism of SDRs is that they are subject to fluctuations. Significantly, however, SDRs fluctuate in value far less than the market price of gold; to the extent that they do fluctuate, those fluctuations are far closer in nature to the fluctuations which have taken place in the official price of gold, to which Franklin Mint refers, than to the wide and unpredictable fluctuations in the free market price of gold. (JA22-25).

In view of the worldwide trend toward the adoption of SDRs as the Warsaw conversion factor, TWA submits that they are certainly an appropriate alternative unit of account.

POINT IV

IN THE EVENT THAT THE WARSAW LIMITATION PROVISIONS ARE FOUND TO BE UNENFORCEABLE IN THE UNITED STATES, THAT HOLDING SHOULD BE PROSPECTIVE ONLY

As previously demonstrated, the limitation of liability provisions of the Warsaw Convention must be enforced and the most appropriate conversion factor for those provisions is the last official price of gold. However, in the event that the Court disagrees and finds the limitation provisions unenforceable, it is respectfully submitted that such holding must be prospective only. Indeed, the Second Circuit so held in reliance upon *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), and *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 102 S. Ct. 2858 (1982).

There is no doubt as to the controlling law. In *Northern Pipeline* this Court held:

Chevron Oil Co. v. Huson, 404 U.S. 97, 92 S. Ct. 349, 30 L. Ed. 2d 296 (1971), sets forth the three considerations recognized by our precedents as properly bearing upon the issue of retroactivity. They are, first, whether the holding in question "decid[ed] an issue of first impression whose resolution was not clearly foreshadowed" by earlier

cases, *id.*, at 106, 92 S. Ct., at 355; second, "whether retrospective operation will further or retard [the] operation" of the holding in question, *id.*, at 107, 92 S. Ct., at 355; and third, whether retroactive application "could produce substantial inequitable results" in individual cases, *ibid.* (102 S. Ct. at 2880).

As to the first factor, there is absolutely no doubt that the holding in question is one of first impression whose resolution was not *clearly* foreshadowed. The only existing CAB regulation, which the airlines were legally bound to follow, clearly provided for the continuation of the Warsaw limits with the last official price of gold as the conversion factor (*see supra* p. 14). Moreover, under Article 18 of the Vienna Convention the airlines were entitled to expect that the United States would maintain the status quo until appropriate international action was taken (*see supra* p. 16).

With respect to the second *Chevron* criterion, it is clear that retroactive application would in no way further a holding that the Warsaw limits are unenforceable. On the other hand, it would visit substantial hardship upon numerous airlines which have made financial arrangements in reliance upon an existing CAB regulation which they are required by law to follow.

Finally, with respect to the third *Chevron* criterion, prospective application would not lead to inequitable results in individual cases. Although Franklin Mint asserts that an inequitable result would occur as to it absent retroactive application, because it would obtain less than a full recovery for its alleged loss, its claim is unfounded. At the time that Franklin Mint contracted for the carriage of its goods via TWA, it was well aware of the existing limits and could have easily covered any potential loss through its own insurance. (*See TWA Main Brief* at 3 n.6). Moreover, it would surely be inappropriate to permit air shippers who shipped their goods at a relatively modest cost predicated upon limited liability to collect for loss without limitation. If such a result were permitted to occur, it would be the air carriers, which obviously cannot retroactively raise their rates for goods already shipped, which would suffer a severe inequity.

CONCLUSION

The Judgment of the United States Court of Appeals for the Second Circuit should be modified insofar as it states that the limitation of liability provisions of the Warsaw Convention are prospectively unenforceable; the last official price of gold or, in the alternative, SDRs should be designated as the conversion factor for the Warsaw Convention's limitation of liability provisions.

Dated: New York, New York
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CLERK

Nos. 82-1186 and 82-1465

IN THE
Supreme Court of the United States

OCTOBER TERM, 1983

TRANS WORLD AIRLINES, INC.,
Petitioner & Cross-Respondent,
v.

FRANKLIN MINT CORPORATION, FRANKLIN MINT LIMITED AND
MCGREGOR, SWIRE AIR SERVICES LIMITED,
Respondents & Cross-Petitioners.

On Writ Of Certiorari To The United States
Court Of Appeals For The Second Circuit

**BRIEF AMICUS CURIAE OF AIR TRANSPORT
ASSOCIATION OF AMERICA
IN SUPPORT OF PETITIONER
TRANS WORLD AIRLINES, INC.**

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August 29, 1983

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1983

TRANS WORLD AIRLINES, INC.

Petitioner & Cross-
Respondent,

v.

FRANKLIN MINT CORPORATION,
FRANKLIN MINT, LIMITED, AND
MCGREGOR, SWIRE AIR SERVICES LIMITED,

Respondents & Cross-
Petitioners.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF AMICUS CURIAE OF AIR
TRANSPORT ASSOCIATION OF AMERICA
IN SUPPORT OF PETITIONER
TRANS WORLD AIRLINES, INC.

The Air Transport Association of
America ("ATA") as amicus curiae sup-
ports the position taken by Trans World
Airlines, Inc. ("TWA") on the review by

this Court of the Decision of the United States Court of Appeals for the Second Circuit, 690 F.2d 303 (2d Cir. 1982). In accordance with Rule 36(2) of this Court, counsel for Petitioners and Respondents have given their written consent for ATA to file this brief as *amicus curiae*.

I. INTEREST OF THE AMICUS CURIAE, AIR TRANSPORT ASSOCIATION OF AMERICA

ATA is a non-profit, unincorporated association of federally licensed airlines.^{1/} Twenty-nine ATA member airlines

¹ATA's members include Air California, Air Canada, Air Florida, Alaska Airlines, Aloha Airlines, American Airlines, Best Airlines, Braniff International, Capitol International Airways, Continental Airlines, CP Air, Delta Airlines, Eastern Air Lines, Evergreen International Airlines, Federal Express, The Flying Tiger Line, Frontier Airlines, Hawaiian Airlines, Midway Airlines, Muse Air, Northwest Airlines, Ozark Air Lines, Pan American World Airways, Piedmont Airlines, Pacific Southwest Airlines, Republic Airlines,

(Continued next page)

provide scheduled domestic air transportation. Fifteen of them provide scheduled foreign air transportation to some 68 foreign countries. Two of the Association's associate members, Air Canada and CP Air, are foreign air carriers engaged in international air transportation to many points in the world including 11 points in the United States. All of the ATA members provide transportation of passengers or cargo which is subject to the terms of the almost universally subscribed Warsaw Convention,^{2/} which as-

¹ (Continued from previous page)
Trans World Airlines, United Airlines,
USAir, Western Airlines and Wien Air
Alaska.

² Convention for the Unification of
Certain Rules Relating to International
Transportation by Air, October 12, 1929,
49 Stat. 3000, T.S. 876 (referred to
herein as "Warsaw Convention" or
"Convention").

sures a uniform, facile and predictable commercial relationship between air carriers and the traveling and shipping public in international air transportation.

The refusal of the United States Court of Appeals for the Second Circuit to enforce (prospectively) Article 22 of the Convention, on non-constitutional grounds, is the issue presented in this case. This issue in turn raises a constituent question as to the continued existence of a proper basis for converting judgments under the Convention into local currencies. ATA is concerned about the impact that the refusal to apply the liability limitations set forth in Article 22 would have on all of its air carrier members, including those who were not before the court in the Franklin Mint case. ATA is also concerned over the

impact that abrogation of a key provision of the Convention by the Judicial Branch of the U. S. Government would have on other international agreements and conventions critical to the safe and orderly future development of international aviation.^{3/}

II. SUMMARY OF ARGUMENT

Under the Constitution and decisions of this Court, the power to make or abrogate treaties rests with the Executive and Legislative Branches of government and not the Judicial Branch. Courts may abrogate treaties only on Constitutional grounds. See infra pp. 12-17.

Decisions of this Court also require that treaties be construed liberally to

³See Preamble, Convention on International Civil Aviation, December 7, 1944, 61 Stat. 1180, T.I.A.S. No. 1591.

uphold the intentions and shared expectations of the sovereign parties to them, gleaned from the negotiating history and subsequent actions of the parties. See infra pp. 17-26.

The parties to the Warsaw Convention intended, when the treaty was drafted in 1929 and in subsequent protocols, that Article 22 impose a stable limit in both cargo and passenger cases at a level measured by the official price of gold. See infra pp. 26-41.

The refusal of the court below to uphold Article 22 prospectively ignores the principles of treaty construction enunciated by this Court. It is based solely on the repeal by Congress of the Par Value Modification Act ("Par Value Act") in 1976, abolishing the official price of gold in the United States, which

makes no mention of the Convention, either in the Public Law itself or in its legislative history. If the decision below is to stand, this Court must conclude (1) that Congress abrogated Article 22 sub silentio, contrary to its numerous decisions, or (2) that the court below was justified in abrogating the provision based on its belief that it was free to do so because Congress regarded the official price out of touch with economic and monetary reality for other purposes. If the court's action is not viewed as an act of abrogation it must be regarded as an impermissible, attempted reservation to Article 22. See infra pp. 10-11;44-47.

In keeping with the intent of the parties, the Poincaré franc should be converted into local currencies on the

basis of the last official price of gold, or the SDR. See infra pp. 33-41.

Refusal of the United States to enforce Article 22 would be a material breach of the Convention. Such a breach could erode the near universality of the Convention, since many parties regard a stable limit as the sine qua non to their participation. See infra pp. 54-60.

III. ARGUMENT

- A. The Warsaw Convention, to Which the United States Adhered and Pledged Faithful Support in 1934, Is a Comprehensive Treaty Which Prescribes Rules of International Carriage by Air and Establishes a Liability Regime for Cargo and Passengers.

The Warsaw Convention is a treaty comprised of a number of interdependent provisions. Insofar as it pertains to cargo, the subject matter involved in the instant case, the Convention establishes

uniform documentation requirements which supersede otherwise confusing and sometimes inequitable local requirements around the world. Absent these provisions both shippers and airlines would be uncertain as to whether the documents reflecting their commercial transactions run afoul of one or more of these local requirements.^{4/} Articles 3 and 11 were adopted to avoid such a possibility. The resulting uniformity has permitted the development of airline agreements which make it possible to ship cargo anywhere in the world on a single air waybill.

With a few exceptions, the Convention makes carriers liable for loss, damage, destruction or delay of international cargo by creating a rebuttable

⁴See C. Shawcross and K. Beaumont, Air Law, 40 n.(e) (2d ed. 1951) at 71.

presumption (Article 18); establishes a limit on liability in all save exceptional circumstances (Articles 22 and 25); and specifies the jurisdiction within which claims may be prosecuted (Article 28). These provisions also limit significantly the maze of conflicting legal theories of liability, philosophies of recompense, and conflicts of laws problems that otherwise would have to be dealt with on an ad hoc basis by courts of nations with different legal systems.^{5/}

In order to assure that the treaty is kept intact as a whole instrument, the Convention's single reservation provision

⁵ A similar regime establishing liability and documentation rules and imposing limits on recoveries applies in the case of passengers.

is very restrictive, authorizing a reservation by a sovereign party only with regard to international air transportation performed directly by the state.^{6/}

The United States played no role in developing the original Convention. However, in proclaiming U. S. adherence to the Convention on October 29, 1934, President Roosevelt pledged:

" . . . that the same and every article and clause thereof may be observed and fulfilled with good faith by the United States of America . . . subject to the reservation aforesaid." Proclamation of President Franklin D. Roosevelt declaring U. S. adherence to the Warsaw Convention. 49 Stat. 3000, T.S. 876 (1934) (underscoring added).

⁶See Additional Protocol With Reference to Article 2. 49 Stat. 3025.

This restrictive reservation provision is looked to by most parties as a guarantee that no participant will attempt to abrogate the limitations on liability.

This proclamation of effectiveness was issued by the President after receiving the advice and consent of the Senate, and after depositing the instrument of adherence in July of 1934. It therefore bespeaks the expectation of the Executive and Legislative Branches of the United States Government that this nation will honor all Articles of the Convention.

- B. The Decision Below Refusing to Enforce Article 22 of the Convention Is an Abrogation of a Treaty and Thus an Invasion of the Constitutional Prerogatives of the Executive and Legislative Branches of the Government. It Also Ignores Established Principles of Treaty Construction and Fails to Uphold the Intent of the Parties to the Treaty.

The court below declared Article 22 of the Convention prospectively unenforceable. It did not find that Article 22 or any other article of the treaty violates the Constitution; nor did it

give proper heed to principles of treaty construction recognized by this Court in discerning and following the intent of the parties to treaties. It amounts to an abrogation of a cornerstone provision of this half-century old treaty and thus of the treaty as a whole, on non-constitutional grounds, in defiance of its acceptance in toto by the Executive and Legislative Branches of Government.

1. The Constitution Places the Treaty Power, Including the Power of Abrogation for Other Than Constitutional Reasons, in the Executive and Legislative Branches of Government, Not in the Judicial.
-

The Constitution of the United States entrusts treaty-making to the Executive and Legislative Branches of Government. Article II, Section 2, of the Constitution provides:

"[The President] shall have the Power, by and with the Advice and

Consent of the Senate, to make Treaties, provided two-thirds of the Senators present concur"

No role is specified for the Judiciary.

This does not mean that a treaty is above the Constitution, that Constitutional constraints can be circumvented by entering into a treaty or that courts have no role to play in determining whether a treaty measures up to the requirements of the Constitution. However, it does mean that the Judicial Branch is not a forum in which to urge abrogation of a treaty provision on other than Constitutional grounds.

This Court's recognition of the limited role of the Judiciary in reviewing treaties is well established. In 1853 it made a clear pronouncement of the limited circumstances in which the Judiciary may disregard a treaty provi-

sion. In Doe, ex dem. Clark v. Braden,
57 U.S. (16 How.) 635 (1853), it said:

"The treaty is therefore a law made by the proper authority, and the courts of justice have no right to annul or disregard any of its provisions, unless they violate the Constitution of the United States. It is their duty to interpret it and administer it according to its terms." 57 U.S. (16 How.) 657.

Whitney v. Robertson, 124 U.S. 190, 194-95 (1888) recognized that decisions regarding treaties involve diplomatic considerations unsuited to the Judiciary:

". . . the power to determine these matters [a promise contained in a treaty] had not been confided to the judiciary, which has no suitable means to exercise it, but to the Executive and Legislative Departments of our Government; and that they belong to diplomacy and legislation, and not to the administration of the laws. . . ." 124 U.S. 195.⁷

⁷This opinion agreed with Taylor v. Morton, 2 Curtis 454, 459 (C.C.D. Mass. 1855), aff'd, 67 U.S. 481 (1863).

Similar pronouncements have been made by this Court in Terlinden v. Ames, 184 U.S. 270 (1902); and Pigeon River Improvement Slide and Boom Co. v. Charles W. Cox, Ltd., 291 U.S. 138 (1934). See De Geofroy v. Riggs, 133 U.S. 258 (1890).

We are unaware of any instance in which this Court has departed from its consistent recognition of the limited role of courts in abrogating treaty provisions; nor, we respectfully submit, would the Constitution permit it. In short, unless a provision of a treaty violates the Constitution, or a subsequent Act of Congress specifically contradicts or supersedes it, the courts have no charter to refuse to observe the treaty, that being the prerogative of the other branches of Government. Protestations of dissatisfaction with a treaty on

non-constitutional grounds should be addressed, not to the courts, but to the other branches.

2. It Is the Function of Courts to Construe Treaties Liberally to Effect the Intention of the Parties on the Basis of the Treaty Itself, the Negotiating History, and the Conduct of the Parties Subsequent to Ratification.

Not only are the courts not free to second guess the President and Congress as to the wisdom of a treaty's provisions, their charge is to uphold it as the law of the land^{8/} and to observe the

⁸U.S. Const. art. VI.

As Chief Justice Marshall said in *Foster v. Neilson*, 27 U.S. (2 Pet.) 415 435 (1829):

"Our Constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in courts of justice as equivalent to an Act of the Legislature, whenever it operates of itself without the Aid of any legislative provision."

(Continued next page)

intentions of the parties to it. To do this, courts must construe treaty provisions liberally in order to effect the apparent intentions of the parties. In doing so, courts should look to the deliberations of the parties in negotiating and drafting the treaty, and must take cognizance of the subsequent conduct of the parties.

This Court recognized the need for a liberal construction of treaties in order to uphold them and implement the intent of the parties almost a hundred years ago

⁸(Continued from previous page)
The Warsaw Convention is just such a self-executing treaty, as pointed out by the Solicitor General in the Brief for the United States as Amicus Curiae on Petitions for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit, at 10-11.

in De Geofroy v. Riggs, supra. As stated in that decision:

"It is a general principle of construction with respect to treaties that they shall be liberally construed, so as to carry out the apparent intention of the parties As they are contracts between independent nations, in their construction words are to be taken in their ordinary meaning, as understood in the public law of nations, and not in any artificial or special sense impressed upon them by local law, unless such restricted sense is clearly intended." 133 U.S. 272 (underscoring added).

More recent decisions of this Court have made the point even more forcefully. In Nielsen v. Johnson, 279 U.S. 47 (1929), this Court emphasized the need for more liberal construction in the case of treaties than is sometimes required in construing statutes of the same legislative body:

"The narrow and restricted interpretation of the treaty contended for by respondent, while permissible and often necessary in construing

two statutes of the same legislative body in order to give effect to both so far as is reasonably possible, is not consonant with the principles which are controlling in the interpretation of treaties. Treaties are to be liberally construed so as to effect the apparent intention of the parties. . . ." 279 U.S. 51-52 (underscoring added).^{9/}

In Nielsen, this Court also recognized the need to look to the deliberations of the parties in negotiating a treaty and to their own practical construction of it, saying:

"When [a treaty's] meaning is uncertain, recourse may be had to the negotiations and diplomatic correspondence of the contracting parties relating to the subject matter and to their own practical construction of it." Id. at 52 (court's citations omitted).

⁹The same principle has been enunciated a number of times in other cases: Factor v. Laubenheimer, 290 U.S. 276, 293-94 (1933); Jordan v. Tashiro, 278 U.S. 123, 127 (1928); Asakura v. Seattle, 265 U.S. 332, 342 (1924); Tucker v. Alexandroff, 183 U.S. 424, 437 (1902).

The Second Circuit itself recognized the importance of a practical construction of the Warsaw Convention in Eck v. United Arab Airlines, Inc., 360 F.2d 804, 812 (2d Cir. 1966).

In construing treaties so as to uphold their provisions as the parties intended, American courts have also recognized the need to take cognizance of changed circumstances which may not have been foreseen by the parties. Mr. Justice Holmes, speaking for this Court in Missouri v. Holland, 252 U.S. 416 (1920), said:

"[W]hen we are dealing with words that also are a constituent act . . . we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters." 252 U.S. 433.

Recognition that a treaty has

"called into life a being the development

of which could not have been foreseen completely" underscores the need, noted by this Court in Nielsen, to take into account the practical construction of the treaty by the parties. To do so requires due regard for their shared expectations, as gleaned from their actions in the years following ratification. As the Second Circuit said in Day v. TWA, 528 F.2d 31 (2d Cir. 1975):

"For a court to view a treaty as frozen in the year of its creation is scarcely more justifiable than to regard the Constitutional clock as forever stopped in 1787."

* * *

"The conduct of the parties subsequent to ratification of a treaty may, thus, be relevant in ascertaining the proper construction to accord the treaty's various provisions.¹⁰" 528 F.2d 35-36.

¹⁰The Court continued:

"See Pigeon River Improvement Slide & Boom Co. v. Cox, 291 U.S. 138, 158-63, 54 S. Ct. 361, 78 L.Ed. 695 (1934); Husserl v. Swiss Air Transport Co., [485 F.2d 1240 (2d Cir. (Continued next page)

By upholding another decision of the Second Circuit, Maximov v. United States, 299 F.2d 565 (2d Cir. 1962), aff'd, 373 U.S. 49 (1963), this Court lent further support to the need for practical interpretations in order to respect the intent and "shared expectations" of the contracting parties. In Maximov the Second Circuit said:

"The basic aim of treaty interpretation is to ascertain the intent of the parties who have entered into agreement, in order to construe the document in a manner consistent with that intent. Rocca v. Thompson, 223 U.S. 317, 331-332, 32 S.Ct. 207, 56 L.Ed. 453; Restatement, The Foreign Relations Law of the United States § 129 (Tent.Draft No. 3, 1959). And

¹⁰ (Continued from previous page) 1973)]; Harvard Research, Article 19; M. McDougal, H. Lasswell and J. Miller, The Interpretation of Agreements and World Public Order 56, 58 (1967); II. C. Hyde, International Law 72 (1922); Vienna Convention Art. 31(3).¹³/" (Court's footnote omitted).

to give the specific words of a treaty a meaning consistent with the genuine shared expectations of the contracting parties, it is necessary to examine not only the language, but the entire context of agreement. We must therefore examine all available evidence of the shared expectations of the parties" 299 F.2d 568.

The importance of construing treaties to honor the intent of the contracting parties and their shared expectations, particularly in situations in which circumstances have changed since the treaty was drafted, was pointed out by the Second Circuit in Eck, supra, at 812 n.18:

"The principles of interpretation set out in the text are of a general applicability. They would seem, however, to have a special relevance when it is a treaty that must be interpreted, for the language of such a document is less likely to be modified in the light of changing conditions than is the language passed by a legislative body that convenes regularly. Cf. Kolovrat v. Oregon, 366 U.S. 187, 192-194, 81 S.Ct. 922, 6 L. Ed.2d 218 (1961)."

This observation pinpoints one of the practical problems that would be posed by upholding the decision below, i.e., the difficulty of securing prompt revision (negotiation, ratification, and bringing into force) of the treaty.^{11/}

Adhering to the foregoing principles of treaty construction, as enunciated by this Court and the Second Circuit, thus requires that account be taken of the intention of the parties to the Convention as revealed by their deliberations in 1929 and by their subsequent actions in considering protocols to the Convention and in making other interim

¹¹E.g., this U. S. effort to update the Convention began in 1966. The Guatemala Protocol which has been subsumed by Montreal Protocols 3 and 4 was opened for signature in 1971. To date the Montreal Protocols have been ratified by only a handful of nations and are still pending before the U. S. Senate. See infra p. 53 n.39.

arrangements. See Article 31(3), Vienna Convention on the Law of Treaties [8 I.L.M. 679 (1969)] ("Vienna Convention").^{12/} It also calls for a liberal construction of Article 22, if need be, in order to uphold it.

3. It Is Clear From Article 22 of the Convention, the Intent of the Parties Who Developed the Convention, and the Subsequent Actions of the Parties to It, That the Convention Is Expected to Limit Liability at a Reasonably Uniform and Stable Level. That Basic Intent and Expectation Must Be Honored by This Court.
-

The language of the Convention limiting recoveries is clear as is the in-

¹²The United States has not ratified the Vienna Convention; however, as Secretary of State Rogers wrote President Nixon in 1971, urging its transmittal to the Senate, "[a]lthough not yet in force, the Convention is already generally recognized as the authoritative guide to current treaty law practice." S.Exec. Doc. L.92d Cong., 1st Sess. See also: Day v. TWA, 528 F.2d 36; Weinberger v. Rossi,

(Continued next page)

tention of the parties to preserve such a limit. Article 22 of the Convention provides that "in the transportation of. . . goods, the liability of the carrier shall be limited to a sum of 250 francs per kilogram. . . ." ^{13/} On their face these words establish a limit. The intent to do so is manifested by the deliberations of the parties who drafted the Convention, and reinforced by their subsequent actions. ^{14/}

¹² (Continued from previous page)
642 F.2d 553 (D.C. Cir. 1980), reversed and remanded, 50 U.S.L.W. 4354, 4355 n.5 (March 31, 1982); Greater Tampa Chamber of Commerce v. Goldschmidt, 627 F.2d 258, 263 n.4 (D.C. Cir. 1980); and Husserl v. Swiss Air Transport Co., 351 F.Supp. 702, 707 (S.D.N.Y. 1972), aff'd per curiam, 485 F.2d 1240 (2d Cir. 1973).

¹³ Warsaw Convention, art. 22, para. (2).

¹⁴ A. Lowenfeld, Aviation Law (2d ed. 1981) ("Lowenfeld"); Lowenfeld and Men-
(Continued next page)

On at least four occasions since the Convention came into force, the parties have considered revisions or alterations to it. In no instance does any of the changes proposed or made raise any doubt that the parties, including the United States, continue to support a limit and expect that it will be observed. In all cases where changes have been considered and made, the United States Government played a major role, often a controlling one.^{15/}

Even though the United States did not ratify the Hague Protocol of 1955,

¹⁴(Continued from previous page)
 delsohn, The United States and the Warsaw Convention, 80 Harv. L. Rev. 497 (1967) ("Lowenfeld and Mendelsohn"); and Boyle, The Guatemala Protocol to the Warsaw Convention, 6 Calif. Western International L.J. 41 (1975) ("Boyle").

¹⁵Lowenfeld, §§4, 5, and 6 at 7-98 et seq.; and Boyle at 42 n.4.

it was a significant force behind many of the changes that were made.^{16/} None of those changes disturbed the fundamental premise of Article 22 -- liability was to be limited.

Since 1955, the Executive Branch has been consistently striving to update the Convention. Revisions sponsored by the United States have always included a significant increase of the limit for passenger cases, but have never suggested abandoning the limit. In that vein, using denunciation as an instrument of its diplomacy, the United States drove a

¹⁶See Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw on 12 October 1929, done at the Hague, Sept. 28, 1955, 473 U.N.T.S. 371. Calkins, Hiking the Limits of Liability at the Hague, Proceedings of the Am. Soc'y of Int'l L. 120, 124 (1962); Lowenfeld and Mendelsohn at 532; and Boyle at 42.

hard bargain with its Convention partners in the mid-60's. Thus, President Johnson served notice of denunciation on November 15, 1965. That notice was withdrawn on May 13, 1966 -- the eve of its effectiveness.^{17/} The withdrawal was occasioned by a provisional arrangement taking the form of an agreement (in accordance with Article 22(1) of the Convention) among the principal international airlines flying to and from the United States, waiving the passenger limit up to US\$75,000 (the "Montreal Agreement").^{18/}

¹⁷ 53 DEPT. STATE BULL. 923-24 (December 6, 1965); 54 DEPT. STATE BULL. 580 (April 11, 1966); and 2 Montreal Proceedings 175-178.

¹⁸ Lowenfeld and Mendelsohn at 497. The agreement entitled "Agreement Relating to Liability Limitations of the Warsaw Convention and the Hague Protocol" (Agreement CAB 18900) was approved by the Civil Aeronautics Board on May 13, 1966. 44 CAB Rept. 819 (1966). See Boyle at 47-49.

This interim arrangement does not address the cargo limits. However, it is another manifestation of the intention of the parties, and the U. S. in particular, to limit liability under the Convention, and it underscores the expectation that Article 22 would be observed by the nations which are parties to it.

The effort of the United States to achieve an increase in the passenger limit was pursued within the legal committee framework of the International Civil Aviation Organization ("ICAO")^{19/} and at a diplomatic conference held at Guatemala City in 1971. The passenger limit was increased and provision was made for further automatic increases at

¹⁹ICAO's legal committees are comprised of a cross-section of representatives of nations in the international aviation community, nearly all of which are parties to the Warsaw Convention.

future dates, but no action was taken to change the cargo limit. Again, it is clear from the Guatemala Conference that all participating parties, including the United States, affirmed the maintenance of a limit in both cargo and passenger cases.^{20/}

The Montreal Diplomatic Conference of 1975 produced a number of changes (Montreal Protocol 4) in the cargo regime of the Convention and, as discussed below (pp. 39-41), changed the unit of account from the Poincaré franc to the SDR. The deliberations of the parties at the Montreal Conference, like those at the Guatemala Conference, leave no room for

²⁰ Boyle at 65-72; and Lowenfeld, \$6.21 at 7-152.

doubting that all parties continue to expect Article 22 to limit recoveries.^{21/}

4. Conversion of the Poincaré Franc Into U. S. Dollars on the Basis of the Last Official Price of Gold or the SDR Is Permissible Under the Convention and Would Comport With the Expectations of the Parties to the Convention.
-

In reaching conclusions as to the intention of the drafting parties in the 1925 - 1929 period, it is important to bear in mind that international monetary arrangements were based on the so-called gold standard.^{22/} This helps explain

²¹Lowenfeld, §6.51 at 7-169.

²²Each participating nation denominated its currency in terms of a specified amount of gold which it was obligated to give the bearer of its notes on demand. Asser, Golden Limitation of Liability in International Transport Conventions and the Currency Crisis, 5 Journal of Maritime Law and Commerce 645 (1974) ("Asser"); and Barlow, Article 22 (Continued next page)

some of the actions taken at the diplomatic conference in 1929.

A panel of legal experts^{23/} had proposed including the following statement in Article 23 (the predecessor of Article 22): "[t]he values here above are gold values." The proposal was rejected.^{24/} The Conference also refused to accept the suggestion that Article 22 refer simply to the French franc even though it was advised by the French delegate that, by parliamentary action, the

²² (Continued from previous page)
of the Warsaw Convention: In a State of Limbo, 8 Air Law 2, 5 (1983) ("Barlow").

²³ Comité International Technique d'Experts Juridiques Aériens.

²⁴ Second International Conference on Private Aeronautical Law, Minutes, October 4-12, 1929, Warsaw, at 265 (Horner and Legrez trans. 1975) ("Warsaw Minutes").

franc had been stabilized in reference to gold.^{25/}

As the opinion below recognized, selection of the Poincaré franc represented a compromise between the French and Swiss views, the latter being willing to accept reference to the French franc if it were a gold franc of specified gold content.^{26/} The Swiss representative reasoned, and the Conference agreed, that with such a reference to gold the international value of recoveries would

²⁵Warsaw Minutes at 88-89.

²⁶Article 22(4) provides that "[t]he sums mentioned above shall be deemed to refer to the French franc consisting of 65 1/2 milligrams of gold at the standard of fineness of nine hundred thousandths. These sums may be converted into national currency in round figures."

Warsaw Minutes at 89-90; Franklin Mint, 690 F.2d 307.

be unchanged even if the Poincaré franc were altered by statute.

By using the gold franc, the parties were able to set the limit at a level comprehensible to all of them. Doing so facilitated a meeting of the minds as to the order of magnitude of the limitation on which they agreed.

From the beginning, the parties who drafted the Convention were concerned that wide fluctuations^{27/} in the agreed level as a result of unilateral action taken by one of the contracting parties with regard to its own currency could impair the integrity of the treaty. As stated above, at no time since the Convention came into force has there been a deviation from this central objective of stability.

²⁷ Asser at 663-64.

The action taken at the Hague Conference in 1955 reflects recognition by the participating parties that, when converted into local currencies, the level of recoveries might vary somewhat if the official price of gold changed as it had done in 1934 when it increased from \$20 an ounce to \$35 an ounce.^{28/} However, acceptance of changes of this magnitude does not sanction the conclusion that Article 22 permits the agreed level to be rendered meaningless by judicial decrees (1) refusing to enforce the limit, as did the court below, or (2) converting judgments on the basis of the commodity value of gold, as urged by Franklin Mint. The former would disregard the intentions of the parties completely; the latter would

²⁸ Barlow at 5-6. See Lowenfeld, \$4.11 at 7-99.

subject recoveries to wild fluctuations, at many times the agreed level, often as a result of events having nothing to do with the treaty or monetary policy.

The Montreal Agreement of 1966 (see supra pp. 29-31) did not involve cargo and its increased limit is denominated in U. S. dollars. It is, however, a continuing reflection of the intention of the United States to maintain a reasonably stable level of recoveries.

At the Guatemala Conference in 1971, all discussions regarding proposed increases in the passenger limitation (also contained in Article 22) were in terms of U. S. dollars. When the \$100,000 limit was agreed upon, it was converted into Poincaré francs on the basis of the official price of gold.

Later at the 1975 Montreal Conference^{29/} most of the signatories to the

²⁹ Preparatory work for the Montreal Conference was done through ICAO. An interpretative resolution, adopted by the Legal Committee without opposition in 1974, reveals the intention of the parties that the limits set in Article 22 be at a level determined by use of the official price of gold. The following paragraphs from the underlying submission make this clear, and are noteworthy in light of Article 31(3) of the Vienna Convention, supra:

"All the considerations mentioned above lead to the conclusion that the reference to gold in the conventions should be understood as a reference to the official value of gold. . . .

"The proposal contained in WD No. 848 is intended to assure that the gold franc clauses in the international air law conventions continue to be interpreted in the manner intended by the drafters of these conventions. It is only an interpretative clause, and is not intended to change or amend the conventions in any way." Report of the 21st Session of the Legal Committee, Montreal, 3-22 October 1974, Doc 9131-LC/173-2, LC/Working Draft No. 846-12.

Convention, led by the United States, had become convinced that the unit of account should be changed in order to assure that actual recoveries would be at or near the level they had intended.^{30/} In choosing the SDR as the substitute for the Poincaré franc, the parties were reacting to the emerging changes in the international monetary system (and the reaction of the courts of some nations to those changes).^{31/}

This action reflects the preference for the SDR as an easily convertible unit

³⁰ Ward, The SDR in Transport Liability Conventions: Some Clarification, 13 Journal of Maritime Law and Commerce 1, 2 (1981).

³¹ Detailed Report of the U. S. Delegation on International Conference on Air Law held under the auspices of the International Civil Aviation Organization, Montreal, September, 1975, p. 17. See Lowenfeld, §6.51 at 7-168.

of account for the long term. But it was also taken in anticipation of possible conversion of the Poincaré franc on the basis of the market price of gold which, in many cases, would amount to increasing the limitation to a level never intended by the parties or agreed to by them. And, important from the perspective of this case, the contemplated change was made by amending the treaty.

C. The Repeal of the Par Value Modification Act Does Not Sanction a Refusal to Enforce Article 22 of the Convention.

While the opinion below reveals an awareness of the objectives of the parties who designed the Convention and their actions subsequent to its coming into force (690 F.2d 306-309), it ignores the message of decided cases and fails to apply the principles of treaty construction set forth above (pp. 17-26).

Rather, the decision seems to turn entirely on the repeal of the Par Value Act and the court's notions of what that portends for Article 22.

1. The Decision Below Is Based on a Misconception of the Legal Effects of the Repeal.

We submit that the court below misconceives the import of the repeal. By acknowledging that Congress may not have focused "explicitly" on the Convention (690 F.2d 311), the court below apparently concedes that Congress did not make clear its intention to abrogate Article 22 when it repealed the Par Value Act. This seems to gainsay a previous pronouncement that the repeal was "an explicit abandonment of the previously established unit of conversion." Id.

However that apparent contradiction is resolved, this Court, if it is to sus-

tain the decision below, must conclude either (1) that Congress abrogated a critical provision of the Convention sub silentio; or (2) that the court below was justified in doing what Congress did not do on the basis of its own finding that Congress felt that the official value of gold did not comport with economic and monetary reality for other purposes. Id. at 309 and 311. Neither conclusion finds support in previous decision of this Court.

On a number of occasions, this Court has made clear that general language in a statute is not sufficient to nullify a treaty provision. In United States v. Lee Yen Tai, 185 U.S. 213, 221 (1902), it said:

"Nevertheless, the purpose by statute to abrogate a treaty or any designated part of a treaty, or the purpose by treaty to supersede the

whole or a part of an act of Congress, must not be lightly assumed, but must appear clearly and distinctly from the words used in the statute or in the treaty." 185 U.S. 221 (underscoring added).

Cook v. United States, 288 U.S. 102

(1933) makes the same point, as does

Pigeon River Improvement Slide and Boom

Co. v. Charles W. Cox, Ltd., 291 U.S. 138

(1934), in which this Court cautioned that ". . . the intention to abrogate or modify a treaty is not to be lightly imputed to the Congress." 291 U.S.

160.³²/

If, as the Second Circuit's decision acknowledges, the statute repealing the Par Value Act fails to refer to the

³²See Menominee Tribe of Indians v. United States, 391 U.S. 404, 413 (1968); Washington v. Washington State Commercial Passenger Fishing Vessel Assoc., 443 U.S. 658, 690 (1979); and Kimball v. Callahan, 590 F.2d 768, 775 (9th Cir.), cert. denied, 444 U.S. 826 (1979).

treaty and if, as is the case, the legislative history is devoid of any reference to it, the decisions of this Court discussed above will not permit the conclusion -- essential to upholding the lower court's decision -- that Congress has abrogated Article 22 of the Convention through silence. Nor do the precedents of this Court sanction the lower court's doing what Congress did not do^{33/} because of its own finding that "[t]he repeal of the Par Value Modification Act was based on a domestic and international conclusion that the official price of gold was wholly out of touch with eco-

³³Permitting the court below to refuse to enforce a treaty on this basis amounts to empowering it to shift the burden to Congress to enact additional legislation to preserve the Convention when there is no indication that Congress intended the repeal of the Par Value Act to affect the treaty.

nomic and monetary reality." 690 F.2d 309. The court made no finding that the use of the last official price of gold was out of touch with the intention of the parties to the treaty. Nor could it.

In short, the court below simply refused to honor a treaty commitment. This is abrogation by the Judiciary. For the reasons set forth by this Court in previous cases, that action cannot stand.^{34/}

The court below seems to believe that its refusal to enforce Article 22 prospectively does not constitute abrogation. We submit that there is no distinction between a refusal to enforce a cornerstone provision and outright abrogation of that provision. However, should

³⁴ Doe, ex dem. Clark v. Braden, supra; Whitney v. Robertson, supra; Ter-Iinden v. Ames, supra; Pigeon River Improvement Slide and Boom Company v. Cox, supra. See supra pp. 14-17.

this Court conclude otherwise, the lower court's decision surely must be regarded as an attempted reservation to the Convention. As set forth above (pp. 10-11), the Convention does not permit a reservation other than the one specified. Hence the decision below cannot stand without violating the Convention. Nor could the Judicial Branch create a reservation to a treaty, even if the Convention permitted it, since the Judicial Branch is not permitted to engage in treaty-making by the Constitution.

2. Conversion of the Poincaré Franc into U. S. Dollars on the Basis of the Last Official Price of Gold Is Not Precluded by the Repeal.

The court below stated that it had no authority to accept any of the arguments made by the parties as to how the Poincaré franc could be converted into

dollars. It found a "devastating argument" against each of them. 690 F.2d 306.

In addition to misconceiving the impact of the repeal of the Par Value Act on Article 22, the court below erred in holding that it could not enforce Article 22 without "picking and choosing among alternative units of conversion" or selecting "a new unit of account." We agree that it is not the court's function to pick the unit of account or the level of the limitation. Nor is it necessary. That was done by the parties to the treaty. The court's function is to determine the intention of the parties and respect it.^{35/} See supra pp. 17-41.

³⁵Nielsen v. Johnson, 279 U.S. 47 (1929); Maximov v. United States, (Continued next page)

Implicit in the decision below is the court's recognition that the parties intended the recoveries to be converted on the basis of the official price of gold, which it would have accepted as a matter of course had the Par Value Act not been repealed. But, as previously demonstrated, the repeal does not alter the court's obligation to respect the intention of the parties, absent a clear and specific action by Congress addressing the Convention.

Applying the injunctions of this court on treaty construction, in the absence of an official price, courts converting Poincaré francs into local currencies must do the next best thing in

³⁵ (Continued from previous page)
299 F.2d 565 (2d Cir. 1962), aff'd, 373 U.S. 49 (1963); Eck v. United Arab Airlines, 360 F.2d 804 (2d Cir. 1966).

order to honor the intention of the parties. In this case the next best thing is to base the conversion on a numéraire which would produce a result at or near the level they intended. The last official price meets these criteria. See supra pp. 33-41.

If it is believed that a legislative remedy is necessary to permit conversion on this basis, such action has already been taken by the Civil Aeronautics Board ("CAB"), the independent agency to which Congress has delegated rate-making authority and tariff supervision in the case of international air transportation.^{36/} The CAB acting in a quasi-legislative

³⁶The Airline Deregulation Act of 1978, which contemplates the ultimate demise of the CAB, makes specific provision for the transfer of this function to the Department of Transportation. 92 Stat. 1744, 49 U.S.C. §1551 (Supp. V 1981).

capacity ordered all airlines to file tariffs setting forth the dollar limit of liability imposed by Article 22 of the Convention. CAB Order 74-1-16 (January 3, 1974).

The Board's Order which was based on the official price of gold is still in effect: the aforesaid tariffs must be filed and observed by international carriers as mandated by the Civil Aeronautics Board in accordance with Section 1002(j) of the Federal Aviation Act. 94 Stat. 40-42, 49 U.S.C. §1482(j) (Supp. V 1981). As a consistent reflection of a prevailing treaty and thus the requirements of Section 1102 of the Federal Aviation Act (94 Stat. 42, 49 U.S.C. §1502) (Supp. V 1981), these tariffs are

binding on air carriers and international shippers including Franklin Mint.^{37/}

The Executive Branch, speaking through the Solicitor General, has added its voice in support of the limitation imposed by Article 22 and the use of the last official price of gold as the proper basis for converting the Poincaré franc. As the Solicitor stated:

"The court of appeals should have determined which of the proposed measures for translating the limits prescribed by the Convention into dollars best effectuated the intent of the framers." Brief for the United States as Amicus Curiae, supra p. 18 n.8, at 10.

³⁷ Adams Express Co. v. Croninger, 226 U.S. 491 (1913); Boston & Maine R.R. v. Hooker, 233 U.S. 97 (1914); Herman v. Northwest Airlines, Inc., 222 F.2d 326 (2d Cir.), cert. denied, 350 U.S. 843 (1955); Vogelsang v. Delta Air Lines, Inc., 302 F.2d 709 (2d Cir. 1962); and Tishman & Lipp, Inc. v. Delta Air Lines, Inc., 413 F.2d 1401 (2d Cir. 1969).

Doing so, of course, would require use of the last official price, or the SDR.

A good case was made by TWA to the court below for using the SDR as a basis for conversion.^{38/} Although the protocols using the SDR as the unit of account are still pending before the United States Senate for its advice and consent,^{39/} a conversion made on that basis would reflect the intention of the parties to limit liability at a level not too different from that achieved by using the last official price. See supra pp. 39-41. Use of the SDR, like the last official price, would also avoid the wild fluctuations which would occur were the

³⁸Petition of TWA for Rehearing and Suggesting Rehearing In Banc, Oct. 12, 1982, at 10-12.

³⁹Senate Executive Calendar, Item 1, Executive B, 91-1.

market price of gold to be used as Franklin Mint advocates.^{40/}

- D. If the Decision Below Refusing to Apply a Critical Article of the Convention Is Upheld, the United States Will Have Failed to Honor Its Commitment to Other Nations and May Have Seriously Jeopardized a Widely Subscribed and Beneficial Treaty As Well As Its Own Leadership Role in International Aviation. If Those Risks Are to Be Taken on Other Than Constitutional Grounds, the Executive and Legislative Branches of Government Must Make That Decision.
-

As previously set forth, the United States played no role in developing the original Convention. However, its adherence in 1934 was accompanied by a pledge to observe that Convention in good faith, and the United States has been the

⁴⁰As the Solicitor General pointed out "[t]he fluctuations induced by private speculation in gold have no place in the liability limitation regime of the Convention." Brief for the United States as Amicus Curiae, supra, p. 18 n.8, at 14.

prime mover of virtually all changes made or proposed for the Convention since it came into effect.

If the decision below is followed and becomes the law of the land, there is a good chance that many parties to the Convention might regard the decision as having the same practical effect as withdrawal from the entire Convention by the United States since, to many of them, an enforceable Article 22 is the sine qua non to their own participation. At a minimum, such a decision deeming Article 22 unenforceable would be widely construed as a material breach of the Convention which could give rise to collective or individual actions suspending or terminating the treaty vis-a-vis the

United States or all parties. Vienna Convention, Art. 60(2).^{41/}

Thus, the decision below raises the spectre of some participating nations being tempted to return to the extremely low limits imposed by their own local laws -- limits which may be adequate to cover most of their citizens, but far less than the level believed essential for American passengers and shippers by the U. S. Government. In short, since the Convention, as interpreted in the decision below, would not fulfill their expectations of limiting liability in American courts, some nations would have

⁴¹Article 60(3) defines "the violation of a provision essential to the accomplishment of the object or purpose of the treaty" as a material breach. Article 22 of the Warsaw Convention, establishing the limits on liability, is just such a provision.

little reason to continue to abide by the Convention and every justification under customary international law (as reflected in the Vienna Convention) to decline to do so.

The Executive and Legislative Branches of the U. S. Government have recognized the importance of guarding against such a contingency. This is manifested by U. S. adherence to the Convention, including the Montreal Protocols, and its continuing support for ratification of those pending protocols. In April 1983, at a meeting of the ICAO Legal Committee attended by delegations of 53 member nations, one non-member nation and five international organizations, the U. S. Delegation reaffirmed that the Executive Branch "has supported and does

support ratification of these Protocols."⁴²/ Report of the 25th Session of the Legal Committee, Montreal, 12-25 April 1983, Doc 9397-LC/185. This reaffirmation was, of course, consistent with the declaration of the Solicitor General in the Brief for the United States as Amicus Curiae, supra p. 18 n.3, at 2: "The United States remains committed to the Convention as the basic instrument governing questions of liability in the international aviation industry."

⁴² Article 18 of the Vienna Convention specifically requires states which have signed a treaty to "refrain from acts which would defeat the object and purpose of [that] treaty. In the case at hand, the United States has signed, but not yet ratified, the Montreal Protocols. If the decision of the court below stands, the United States will have taken an action which defeats a fundamental object and purpose of those protocols -- maintenance of a limit of liability in international air transportation.

In its role of leadership in seeking modernization of the Convention, the United States has led its treaty partners to believe that it would stand by the limits imposed by Article 22, and the Convention as a whole, until it is updated. If the decision below is allowed to stand, those treaty partners may well doubt the verity of this American commitment. This would place the credibility of the United States at risk, and by doing so, could mortgage the U.S. leadership role in developing other critical international aviation agreements.

IV. CONCLUSION

This Court should uphold the decision below to the extent that it applied the limits established by Article 22 in the instant dispute and converted the

Poincaré franc into United States dollars on the basis of the last official price of gold. It should reverse that decision's further holding that Article 22 of the Warsaw Convention limiting recoveries for loss, damage or delay of cargo is prospectively unenforceable.

Respectfully submitted,

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1983

TRANS WORLD AIRLINES, INC.,
Petitioner,

v.

FRANKLIN MINT CORPORATION, FRANKLIN MINT LIMITED,
and MCGREGOR, SWIRE AIR SERVICES LIMITED,
Respondents.

FRANKLIN MINT CORPORATION, FRANKLIN MINT LIMITED,
and MCGREGOR, SWIRE AIR SERVICES LIMITED,
Petitioners,

v.

TRANS WORLD AIRLINES, INC.,
Respondent.

On Writs Of Certiorari To The United States
Court Of Appeals For The Second Circuit

**BRIEF OF BOEHRINGER MANNHEIM
DIAGNOSTICS, INC.
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Diagnostics, Inc.*

INTEREST OF AMICUS CURIAE

Amicus Curiae Boehringer Mannheim Diagnostics, Inc., formerly known as Hycel, Inc. files this brief with written consent of counsel for Petitioner and counsel for Respondent (copies are attached to the cover letter accompanying this brief). As plaintiff in *Boehringer Mannheim Diagnostics, Inc. v. Pan American World Airways, Inc.*, 531 F.Supp. 344 (S.D. Tex. 1981), appeal docketed, No. 81-2519 (5th Cir. Dec. 30, 1981), Boehringer Mannheim Diagnostics, Inc.'s interest is on the side of Respondent Franklin Mint Corporation. The Fifth Circuit Court of Appeals heard argument on the merits in this Amicus' case on March 1, 1983, but by letters of the Chief Deputy Clerk of March 4, 1983, and June 20, 1983, has indicated that it will withhold its decision pending this Court's determination herein.

QUESTION ADDRESSED

What is the proper conversion factor for the liability limitation set forth in Article 22 (2) of the Warsaw Convention?¹

1. All references to the "Warsaw Convention" or to the "Convention" are to the Convention for the Unification of Certain Rules Relating to International Transportation by Air, opened for signature October 12, 1929, 49 Stat. 3000, T.S. No. 876, 137 L.N.T.S. 11, reprinted in 49 U.S.C. § 1502 note (1976).

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1983

Nos. 82-1186, 82-1465

TRANS WORLD AIRLINES, INC.,
Petitioner,

v.

FRANKLIN MINT CORPORATION, FRANKLIN MINT LIMITED,
and MCGREGOR, SWIRE AIR SERVICES LIMITED,
Respondents.

FRANKLIN MINT CORPORATION, FRANKLIN MINT LIMITED,
and MCGREGOR, SWIRE AIR SERVICES LIMITED,
Petitioners,

v.

TRANS WORLD AIRLINES, INC.,
Respondent.

**On Writs Of Certiorari To The United States
Court Of Appeals For The Second Circuit**

**BRIEF OF BOEHRINGER MANNHEIM
DIAGNOSTICS, INC.
AMICUS CURIAE**

SUMMARY OF ARGUMENT

Article 22 of the Warsaw Convention plainly sets forth the limitation in question as 250 65½-milligram pieces of

.900 pure gold, converted into any national currency, per kilogram of goods damaged or lost. The provision of this certain weight of gold as the unit of account of the limitation cannot be judicially annulled or disregarded, for instance by substituting another unit of account such as some fixed number of dollars, francs, or SDR's. The sole issue is what factor to use for conversion of the unit of account into any national currency. The primary error of the court of appeals was in reading the Convention as specifying the official price of gold as the conversion factor.

The plain meaning of the language of Article 22 controls this issue, unless that meaning is inconsistent with the purposes of Article 22. Free-market price is the only factor which truly "converts" the limitation gold sum, that is, changes it for an equivalent value. Further, use of "last official price" of the dollar or the SDR to translate the limitation into \$20.00 or \$21.87 per kilogram is actually a substitution for the certain weight of gold as the unit of account, a fixed number of dollars. Such a substitution is beyond a court's proper function in interpreting a statute.

The purposes of Article 22 were to fix a limitation sum that represented the average value of goods carried, and that would be free of any one nation's control. To focus on the past monetary function of gold misses the point. While the market forces which led to demonitization of gold cause variation in the free-market price of gold, the free-market price still reflects a real valuation of gold while the dollar has suffered inflation in excess of 600% since 1934, and free-market price represents the intended limitation value far better than "last official

price." Further, only free-market price preserves the freedom of the limitation value from any one nation's control.

So much gold converted into national currencies by its price on the free market might or might not be the choice of a limitation of an international conference today. But under proper judicial interpretation the Warsaw Convention so provides. Once the airlines are denied the fiction of "last official price" and required to obey the law, probably then the law will be re-examined by due legislative process.

ARGUMENT

THE CONVERSION OF THE ARTICLE 22 LIMITATION SUM INTO NATIONAL CURRENCIES MUST BE BY REFERENCE TO THE FREE-MARKET PRICE OF GOLD.

- A. The Liability Limitation set forth in Article 22 of the Warsaw Convention is Defined in Units of So Much Gold per Kilogram, so that the Sole Issue is the Appropriate Factor for Conversion of the Limitation into National Currencies.**

Article 22 of the Convention states in pertinent part:

- (2) In the transportation of . . . goods, the liability of the carrier shall be limited to a sum of 250 francs per kilogram . . .

. . .

- (4) The sums mentioned above shall be deemed to refer to the French franc consisting of 65½

milligrams of gold at the standard of fineness of nine hundred thousandths. These sums may be converted into any national currency in round figures.

49 Stat. 3019.

Article 22 plainly defines the limitation sum which is to be converted into national currencies in terms of so much gold per kilogram. *In Re Air Crash Disaster at Warsaw, Poland, on March 14, 1980*, 535 F.Supp. 833, 843 (E.D.N.Y. 1982), aff'd on other grounds, 705 F.2d 85 (2d Cir. 1983), petition for cert. docketed, No. 83-5 (July 11, 1983). The court of appeals recognized this (690 F.2d at 305, 307), as does TWA (Brief at 22-23). This treaty provision cannot be judicially annulled or disregarded, for instance, by the substitution of SDR's or current francs for gold. *In Re Air Crash Disaster at Warsaw, Poland, on March 14, 1980*, 535 F.Supp. at 843; see *Sumitomo Shoji America, Inc. v. Avagliano*, 102 S.Ct. 2374, 2377 (1982); see also *Board of Lake County Commissioners v. Rollins*, 130 U.S. 662, 670-674 (1889), and 2A Sands, *Sutherland Statutory Construction* 4-5 (4th Ed. 1973). The court of appeals agreed (690 F.2d at 310-311). The sole issue is what factor to use in converting the gold sums into national currencies.

The court of appeals recognized that the limitation is stated in terms of "a unit of account consisting of '65½ milligrams of gold at a standard fineness of nine hundred thousandths,'" and that "the limit per kilogram is 250 multiplied by the dollar value of 65½ milligrams of gold [.900 pure]." (690 F.2d at 305) (emphasis supplied). However, in the next paragraph of the opinion, the court of appeals confuses this unit of account with a "unit"

(more properly, factor) of conversion, beginning with the statement that "The Convention thus selected [gold's official price] as the unit of *conversion* . . .", followed two sentences later by, ". . . the terms of Article 22 continue to utilize gold as the unit of *conversion*." (690 F.2d at 305) (emphasis supplied). Plainly, Article 22 does not specify a factor for conversion of the limitation sums defined in gold.

The courts of appeals' confusion of gold's official price, an example of a conversion factor, with gold itself, a thing of value, permeates its opinion, leading to the conclusion that when Congress repealed the Par Value Modification Act, it "thus abandoned the unit of conversion specified by the Convention and did not substitute a new one." (690 F.2d at 311). Plainly the law repealing the Par Value Modification Act abolished the official price of gold in this country, and the court of appeals properly rejected "last official price" on this basis (690 F.2d at 309-310). Just as plainly, that law simply does not address the Warsaw Convention's use of so much gold as a unit of account in defining the Article 22 limitation. That law only made unmistakably clear what should have been apparent by 1974 at the latest, that there was an issue as to what was the proper conversion factor for the Article 22 limitation sums defined in gold.

Neither the court of appeals' suggestion that "Other parties may continue to protect themselves through insurance." (690 F.2d at 312), nor TWA's observation that a shipper, by not making a special declaration of value, chooses to insure itself (Brief, p. 3, ftn. 6), adds anything toward resolving this issue. The issue remains, what conversion factor determines the limitation value above

which such a shipper must self-insure? TWA assumes such a shipper accepts the \$9.07 per pound limitation set forth in its tariff. But that, too, is circular, since if the \$9.07 per pound limitation is less than that which is laid down in Article 22, any such tariff provision is null and void. Warsaw Convention Art. 23. *Boehringer Mannheim Diagnostics, Inc. v. Pan American World Airways, Inc.*, 531 F.Supp. 334, 349 (S.D. Texas 1981). So also is CAB Order 74-1-16 on which any such tariff is based. Point E., *infra*.

B. The Conversion Factor is Determined By the Plain Meaning of the Language of Article 22 Unless that Meaning is Inconsistent With the Purpose of Article 22.

This Court recently addressed this issue in the context of interpreting another treaty:

Interpretation of the Friendship, Commerce, and Navigation Treaty between Japan and the United States must, of course, begin with the language of the Treaty itself. The clear import of treaty language controls unless "application of the words of the treaty according to their obvious meaning effects a result inconsistent with the intent or expectations of its signatories." *Maximov v. United States*, 373 U.S. 49, 54 (1963). See also *The Amiabile Isabella*, 6 Wheat. 1, 72 (1821).

Sumitomo Shoji America, Inc. v. Avagliano, 102 S.Ct. 2374, 2377 (1982). The Court found that the pertinent language of Article XXII(3) of the Treaty ("Companies constituted under the applicable laws and regulations within the territories of either Party shall be deemed companies thereof and shall have their judicial status

recognized within the territories of the other Party.”) clearly meant that a Japanese subsidiary incorporated in New York was a company of the United States and so could not invoke rights under the Treaty of a company of Japan operating in the United States. 102 S.Ct. at 2378-2379. Finding that both treaty parties’ responsible agencies currently and expressly attributed this same meaning to the Treaty, 102 S.Ct. at 2379, and finding its purpose consistent with its clear meaning, 102 S.Ct. at 2380-2382, the Court concluded:

We are persuaded, as both signatories agree, that under the literal language of Article XXII(3) of the Treaty, Sumitomo is a company of the United States; we discern no reason to depart from the plain meaning of the Treaty language . . .

102 S.Ct. at 2382. Aside from the agreement of the signatories which is not a factor here, the approach of the Court was to treat the plain meaning of treaty language as controlling of the interpretation of the treaty, unless that meaning is shown to be inconsistent with the purpose of the treaty.

C. The Plain Meaning of the Language of Article 22 is Conversion By Use of the Free-Market Price.

The key word, “convert”, in its relevant usage is most often defined to mean an exchange of equivalents: “convert . . . v . . . 15. To change by substitution of something of equivalent value . . .”, *THE OXFORD ENGLISH DICTIONARY* (Compact Ed., Oxford University Press, 1971); “convert . . . vt . . . 2 . . . c: to exchange for a specified equivalent (stock holdings into cash) . . .”, and “conversion table n: a table of equivalents for changing units of

measure or weight into other units", WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE—UNABRIDGED (1961); *convert* . . . vt . . . 2 . . . c: to exchange for an equivalent . . ." WEBSTER'S SEVENTH NEW COLLEGIATE DICTIONARY (1971).

Conversion of the gold limits by the free-market price of gold in any national currency at least approximates an equivalent value, while use of "last official price" in dollars or SDR's, or substitution of the current franc, results in an entirely unrelated real value. See Point D.2.a., *infra*. Writing in 1974, Mr. Paul P. Heller, having concluded that "the Bretton Woods system has collapsed," recognized that:

In the circumstances, the only available fair and equitable valuation of gold can be obtained by accepting its price on the free market.

Heller, *The Value of the Gold Franc—A Different Point of View*, 6 J. Mar. L. & Com. 73, 96 (1974) (hereinafter "Heller").

Consideration of the key word, "convert", in its context is even more instructive. Article 22 does two things: it defines the limitations in units of a certain amount of gold, Point A., *supra*; and it provides for conversion of those gold units into national currencies. It does not provide for a substitution of any other unit of account for the certain amount of gold, and such a substitution would be beyond a court's proper function in interpreting a treaty or statute. The court in *In Re Air Crash Disaster at Warsaw, Poland on March 14, 1980*, rejected the airlines' suggestion of using current French francs or SDR's to calculate the limitations on just this basis, 535 F.Supp.

at 843, as did the district court (525 F.Supp. at 1289) and the court of appeals (690 F.2d at 310-311).

For precisely the same reason, use of "last official price" would be equally improper. "Last official price" is a fiction. It is a fiction because it is purported to be a factor for conversion of the limitations drafted in terms of gold, but it is in fact a one-time substitution at an artificial rate of the dollar for gold as the unit of account. Under this substitution, in the United States the Article 22 limitation per kilogram of damaged goods would be twenty U. S. dollars, the same as if Article 22(2) were rewritten so to specify.

In what appears to be the germinal article for the idea of "last official price," that idea was treated as the fiction it is. Writing in July 1974, Mr. T. C. M. Asser, addressing the problem of determining official gold values of floating currencies, concluded "There appears to be no logical solution". Asser, *The Value of the Gold Franc—A Different Point of View*, 5 J. Mar. L. & Com. 645, 666 (1974) (hereinafter "Asser"). It was only then, and by way of "an illogical assumption," that Mr. Asser suggested "last official price". Asser, *supra*, at 666. As discussed further in Point D.2.a., *infra*, Mr. Asser immediately rejected his own suggestion of "last official price." Asser, *supra*, at 666-667.

There simply is no difference in the substitution of the dollar by the fiction of "last official price" and the substitution of the SDR rejected by the court in *In Re Air Crash Disaster at Warsaw, Poland, on March 14, 1980*, *supra*, 535 F.Supp. at 843, as well as by the district court (525 F.Supp. at 1289) and the court of appeals (690 F.2d at 310-311). Since SDR's lost their gold base on April 1, 1978 along with the dollar and all other IMF

currencies, Martin, *The Price of Gold and the Warsaw Convention*, 4 Air.L. 70, 71 (1979) (hereinafter "Martin"), it would be necessary to use the "last official price" of SDR's or some other arbitrary factor to calculate the limitation. The court of appeals expressly recognized this necessity of setting the level of the limitation were SDR's to be substituted for gold (690 F.2d at 310). TWA does also, although it simply assumes the "last official price" of the SDR would be used (Brief at 34-35).

Only conversion by the free-market price fits the language of Article 22 according to its plain meaning. Free-market price should be used for the conversion unless to do so would be inconsistent with the purposes of Article 22. See *Sumitomo Shoji America, Inc. v. Avagliano*, 102 S.Ct. at 2377.

D. The Purposes of Article 22 as Reflected in the Records of Deliberations of the Delegates to the Convention Compel Use of the Free-Market Price.

1. The Delegates Intended to Fix a Limitation Sum that Would Represent the Average Value of Goods Carried, and that had an International Value, Free of any One Nation's Control.

TWA correctly states that the Convention delegates' deliberations "clearly provide a basis for ascertaining the treaty's purposes and intents." (Brief at 7, n.13). A review of the delegates' remarks in their full context leads to several pertinent conclusions. First, the delegates intended the limitation value to represent the average value of goods carried. This objective was raised by Mr. Ripert and confirmed by Mr. Richter and Mr. Pittard early on

(JA [Joint Appendix] 160-161), and was never questioned. *Second International Conference on Private Aeronautical Law, Minutes* 88-91 (R. Homer D. Legrez trans. 1975) (JA 158-165). The court of appeals alluded to this objective: "Since use of a fixed amount of gold as the Convention's unit was specifically designed to establish a limitation level at a certain value. . . ." (690 F.2d at 309).

Secondly, the delegates intended the limitation value to be an international value, free from control by any one member nation's laws. In the only real confrontation of the deliberation, Mr. Pittard overcame Mr. Ripert's proposal of specifying simply the French franc, or even the U. S. dollar, even though they were currently valued against gold, without expressly basing the limitation on gold, an "international value." (JA 161-164). The court of appeals recognized this (690 F.2d at 307), as does TWA (Brief at 6-7), and as did the court in *In Re Air Crash Disaster at Warsaw, Poland on March 14, 1980*, 535 F.Supp. at 842, 843 n.9.

Thirdly, the limitation was expressed in terms of gold because gold served the above two objectives. Gold was recognized as having a stable real value so that the average value of goods carried could be reliably expressed in terms of gold. Mr. Sudre, The Secretary General, referred to that gold value when he stated regarding the limitation sum: "You have just indicated that you would accept the value of the present stabilized French franc for its gold value . . ." (JA 164). And, as Mr. Pittard stated, the value of gold was ". . . the same in all countries, since there is but one quality of gold . . . an international value." (JA 161). Hence gold was chosen because it tended to reflect a stable real value, and it had an international value free of any one nation's control. See Heller,

supra, at 94-95; Asser, *supra*, at 664; and Martin, *supra*, at 71.

Fourthly, there is no evidence whatsoever in the deliberations that "the framers clearly contemplated use of the governmentally fixed price of gold in adopting it as a unit of account . . ." as stated by the court of appeals (690 F.2d at 310). Even though there had recently been "a stabilization which was done in practically every country" (Mr. Ripert) (JA 162), the expressed concern was that even a stabilized currency such as the new franc could be revalued, or even taken off the gold standard, by new national legislation (Mr. Clarke, as well as Mr. Pittard) (JA 161-163). Mr. Pittard therefore urged the use of gold, which had an international value, on whatever basis, and whether or not, any particular nation valued its currency against it (JA 161-164). The most that can be concluded from Mr. Pittard's remarks, and the deliberations generally, is that the delegates chose to specify the limitation value in gold for the same reasons that Switzerland and other nations preferred to specify their currencies in gold: gold tended to reflect a stable real value, and its value was independent of any one nation's control.

But even if the court of appeal's assertion were true, that gold's monetary function was the reason it was chosen as the limitation standard, the later demonitization of gold would not automatically rule out free-market price as the court of appeals concludes (690 F.2d at 310). The demonitization of gold still would be only a factor in the interpretation of Article 22 in light of today's circumstances. "Conditions and new methods may arise not present at the precise moment of drafting. For a court to view a treaty as frozen in the year of its creation is scarcely more justifiable than to regard the Constitutional

clock as forever stopped in 1787." *Day v. Trans World Airlines, Inc.*, 528 F.2d 31, 35 (2d Cir. 1975), *cert. denied*, 425 U.S. 890 (1976). The delegates probably didn't foresee demonitization of gold, but they probably didn't foresee inflation in excess of 600% either. "But it is no bar to interpreting a statute as applicable that 'the question which is raised on the statute never occurred to the legislature'. Cardozo, *Nature of Judicial Process*, 15 (1921)." *Eastern Air Lines, Inc. v. C. A. B.*, 354 F.2d 507, 511 (D.C. Cir. 1965). To speak of "monetary gold" of old versus the present "commodity gold", e.g., *In Re Air Crash Disaster at Warsaw, Poland, on March 14, 1980*, *supra*, 535 F.Supp. at 842-843, misfocuses the issue. The issue is, does conversion of the limitation sum by the free-market price, or substitution of \$9.07/pound or some other fixed dollar figure as the limitation, better effectuate in today's circumstances the delegates' intent that the limitation sum represent the average value of goods carried, and have an international value, free of any one nation's control?

2. Conversion of the Gold-Based Limitation at the Free-Market Price Effectuates the Intent of the Delegates Better Than Substitution of the Dollar at the Last Official Price.

a. Conversion at the free-market price represents the average value of goods carried better than substitution at the last official price.

Whether one considers that the average value of goods carried today remains equal to the real value of the limitation in 1934, or considers that there has been an increase in the average value of goods per unit of weight

due primarily to advances in and miniaturization of electronics, conversion at the free-market price preserves the drafters' intent to set the limitation at the average value of goods carried better than substitution at "last official price". Assuming a free-market price of \$400 per ounce in 1980, at that time use of the free-market price over-valued the 1934 limitation value by a factor of less than two. In 1934, the limitation for goods of a certain weight would be so much gold worth 35 1934 dollars per ounce. Heller, *supra*, at 93. In 1980, per assumption the same amount of gold would be worth 400 1980 dollars per ounce. One 1934 dollar is worth six 1980 dollars in real purchasing power. Bureau of Consumer Protection, Civil Aeronautics Board, Memorandum on Warsaw Convention Limits (JA 42), at 4. Hence the value of the limitation in 1980 compared to its value in 1934 is 400 compared to 35, but also 1 compared to 6, or, overall, $1\text{-}9/10$ to 1 ($400/35 \times 1/6 = 1\text{-}9/10$). On the other hand, substitution of the dollar at the "last official price", \$42.22 per ounce, under-values the 1934 valuation by a factor of five. Once again, the value of the limitation in 1934 is so much gold at 35 1934 dollars per ounce. But now the same gold in 1980 is to be worth 42.22 1980 dollars per ounce. The 1934 dollar is still worth six 1980 dollars. Now the value of the limitation in 1980 compared to its value in 1934 is 42.22 compared to 35, but also 1 compared to 6, or, overall, $1/5$ to 1 ($42.22/35 \times 1/6 = 1/5$). Gold at the free-market price has maintained its tendency to reflect real values far better than has the dollar. See Heller, *supra*, at 93-95. Writing in October 1974, Mr. Heller concludes: "The increased price of gold on the free market is more in line with the upward movement of cost of living and cost of labor than the increase of the "official" value of gold over the past

forty years from US\$35 to US\$42.222222. . . ." Heller, *supra*, at 95.

The court of appeals considered only that the price of gold on the free market was "the daily fluctuating price of a commodity" in rejecting conversion at the free-market price (690 F.2d at 310). Thus the court of appeals focused on only one factor, day-to-day stability, in rejecting free-market price. However, since July, 1974, at the latest there has been "no logical solution" to the problem of maintaining *day-to-day* stability under a standard defined in gold in a world of floating currencies with either free-market price or official price. Asser, *supra*, at 664-666. Mr. Asser proposed two solutions by way of "an illogical assumption": use of "last official price" and use of non-gold based SDR's. Asser, *supra*, at 666. But he quickly rejected "last official price" because "it does nothing to rectify the fact that fluctuations in the exchange rate between the two currencies lead to immediate and corresponding fluctuations in the 'official' gold price of the first currency." Instead, he urged the use of the basket of currencies approach of the SDR. Asser, *supra*, at 666-667. He recommended that "[w]hen the SDR is pegged to a basket of currencies, the simplest solution would be to replace the gold franc with a certain quantity of SDR's". Asser, *supra*, at 668. The unacceptability to an American court of replacement of the gold amounts by a quantity of SDR's is discussed in Point A., *supra*. However Mr. Asser correctly pinpoints the cause of lack of stability using "last official price", namely "fluctuations in the exchange rate between the two currencies", and rejects it for that reason. Mr. Asser's observation, made in July 1974, was confirmed more recently in the May 23, 1983 Newsweek in an article

titled, "A Return to Bretton Woods?" (reproduced in the Appendix hereto at A-1). While these same exchange rate fluctuations will be encountered in expressing the free-market price of gold into many nations' currencies, the point remains that the claim of day-to-day stability of "last official price" is substantially illusory.

Furthermore, even daily fluctuations in the market price of gold need not be a serious problem. Communications science has far exceeded the requirements of this situation. The London market is the world's primary gold market, and airlines can obtain the London fixes just as CBS news does. And as previously stated by the Fifth Circuit Court of Appeals:

The contract plays a role fundamental to the objectives of the Warsaw Conference. The obligations arising from the contract between the carrier and the passenger carry out the conference goal that the rules of limited liability be known to both parties . . .

Block v. Compagnie Nationale Air France, 386 F.2d 323, 333-334 (1967), *cert. denied* 392 U.S. 905 (1968). Hence the latest London fix at the time the air waybill for the carriage in question is issued should determine the limitation.² Each airline can continually update a computer memory with the current limitation value, and cargo rate information calculated therefrom, just as air-

2. For example, assuming a London fix at \$412.00 per troy ounce, where 1 gram = 0.03215 troy ounce and 1 kilogram = 2.2 pounds:

Limitation per kilogram	= (250) (65½ milligrams) (0.900)	
	= 14737.50 milligrams of gold	
	= .4738 troy ounces of gold	
Dollar limitation per kilo	= \$195.21	
Dollar limitation per pound	= \$195.21 ÷ 2.2	= \$88.73
[Approximate check:	(\$412.00 ÷ \$42.22) (\$9.07)	= \$88.51]

lines currently do with reservation, fare, and flight schedule information. The airline can then call up on its computer terminals what rates to charge for carriage of undeclared value goods.

Most importantly, despite the overwhelming emphasis placed by the court of appeals and TWA on fluctuations in the day-to-day price of gold on the free market, the express desire of the delegates was that the limitation sum represent the average value of goods carried. Significantly, that intent of the delegates is not even mentioned by TWA, and while the court of appeals specifically mentioned the desire of the delegates to "... establish a limitation level at a certain value ..." in rejecting "last official price" (690 F.2d at 309), that court did not mention that desire in examining free market price. Even with its greater day-to-day variations, free-market price serves this intent of the delegates far better than "last official price."

b. Only conversion at the free-market price preserves an international value, free from any one nation's control.

Neither the court of appeals nor TWA suggests that gold has become any less the international value urged by Mr. Pittard. Gold at the free-market price still is a value determined by international factors, free from control by any one nation.³ The point, clearly made by Mr. Pittard, seconded by Mr. Clarke, and ultimately accepted by the delegates, was to avoid using any national currency to define the limitation (JA 161-164), since then "... it's

3. The price of gold on the London market is fixed twice daily by representatives of the world's five largest traders at the price that will result in the largest volume of trading.

your national law which determines it, and one need only have a modification of the national law to overturn the essence of this provision." (JA 162).

If, on the other hand, the gold-based limitation were to be changed over to 9.07 U.S. dollars per pound, or any other dollar amount, the value of the limitation would be at the control of the United States. Even if the dollar is considered relatively stable on a day-to-day basis, as Mr. Pittard stated: "But the fact that a currency has been stabilized does not imply that it is a final thing; a law can always modify another law." (JA 161). What the delegates to the Convention expressly ruled out was the ability of any one nation to control the limitation value. Conversion by free-market price preserves that objective. Substitution of the dollar at "last official price" or any other arbitrary setting of a dollar limitation, directly contradicts it.

E. CAB Order 74-1-16 Does Not Justify Use of "Last Official Price" for the Article 22 Conversion.

In December 1971, as part of the Smithsonian Agreement, the U. S. dollar along with several other currencies were to be revalued. Asser, *supra*, at 651. Effective May 8, 1972, the U. S. official price was formally raised from \$35 to \$38 an ounce. Heller, *The Warsaw Convention and the "Two-Tier" Gold Market*, 7 J. World Trade L. 126, 127 (1973). By order adopted June 2, 1972, the Civil Aeronautics Board ordered the airlines to revise their tariffs to reflect the new official price, "... to accurately express the minimum liability limitations allowed by the Convention . . ." CAB order 72-6-7, 37 Fed. Reg.

11 (1972). Again in February 1973, the United States decided to further devalue the dollar. Heller, *supra*, at 85. As of October 18, 1973, the U. S. official price was formally raised to \$42.22 an ounce, and by order adopted January 3, 1974, the CAB again ordered airlines to revise their tariffs to reflect the new official price, since "... the minimum liability limits specified in Order 72-6-7 and the tariffs currently on file with the Board no longer meet the minimum liability limits of the Convention . . ." CAB Order 74-1-16, 39 Fed. Reg. 1526 (1974) (JA 54).

TWA erroneously places great weight on CAB Order 74-1-16 (Brief at 28-29). As late as 1973, in some official transactions gold was still being converted into currencies at par values or central rates based on U. S. \$42.22 an ounce. Heller, *supra*, at 89. Further, CAB Orders 72-6-7 and 74-1-16 served, as the CAB expressly declared was necessary, to assure that the gold sums of Article 22 were being converted on the basis of a current price. Hence at least the language of Article 22 wasn't clearly offended by these CAB orders. The situation changed entirely beginning in early 1974. Not long after CAB Order 74-1-16 was adopted, "official price" ceased to have any real function, Heller, *supra* at 87-91, Asser, *supra*, at 652, 665, and by Act of October 19, 1976, Pub.L. No. 94-564, 90 Stat. 2660 (1960), the statute which established the official price on which CAB Order 74-1-16 was based was repealed, and the concept of official price formally abolished, effective April 1, 1978. Martin, *supra*, at 70-71. Continued usage of "last official price" after April 1, 1978 clearly offends the language of Article 22. Point C., *supra*. Nothing in CAB Order 74-1-16 supports use of "last official price" after April 1, 1978, or even use of official price after early 1974. The court of appeals agreed

regarding the district court's reliance on Order 74-1-16 after April 1, 1978 (690 F.2d at 309-310).

Moreover, questions of interpretation of provisions of the Warsaw Convention are not matters within the CAB's primary jurisdiction. As stated in *United States v. Decker*, 600 F.2d 733, 737 (9th Cir. 1979): "It is the role of the judiciary to interpret international treaties and to enforce domestic rights arising from them." No CAB action could itself dictate the construction of Article 22. Furthermore, any CAB order or application thereof which is contrary to Article 22 properly construed is void. Warsaw Convention, Article 23; see *Brady v. Roosevelt Steamship Company*, 317 U.S. 575, 582-584 (1943), and *Reed v. Wiser*, 414 F.Supp. 863, 869, n.21 (S.D.N.Y. 1976), rev'd on other grounds, 555 F.2d 1079 (2nd Cir. 1979). Nor does the airlines' continued adherence to Order 74-1-16 after April 1, 1978, lend "last official price" any legitimacy as the court of appeals concluded (690 F.2d at 312), at least in cases such as this *Amicus*', in which the air waybill in question was dated after April 1, 1978, specifically June 27, 1978, *Boehringer Mannheim Diagnostics, Inc., f/k/a Hycel, Inc. v. Pan American World Airways, Inc.*, *supra*, 531 F.Supp. at 346, and in which the instant issue is still pending decision. In such cases, while the airlines "have relied on the last official price of gold" (690 F.2d at 311), plainly the plaintiffs have disputed that reliance. The Warsaw Convention's ". . . evident purpose is to protect shippers as well as carriers." *Leon Bernstein, Etc. v. Pan American World Airways*, 421 N.Y.S.2d 587, 588 (App. Div. 1979). Moreover, the airlines have since 1973 been on notice of this issue, *Heller, The Warsaw Convention and the "Two-Tier" Gold Market*, 7 J. World Trade L. 126, 129 (1973), and since

April 1, 1978, in the court of appeals' terms, "The case for continuing to use the now repealed price of gold thus finds no support in law or logic." (690 F.2d at 309).

Finally, this issue was put in proper perspective in 1979:

In the United States it is believed that no change is at present contemplated in the method of calculation used in CAB Order 74-1-16 where the former United States 'official' price of gold of U. S. \$42.22 per fine ounce is used as the base: however, it is plain that this Order, which is purely administrative, is not likely to be upheld as declaratory of the law if the matter of conversion were to come before the courts of the United States. I sometimes think that the collapse of the present 'official' price/SDR system will begin in a low value cargo claim litigated in a New York night court!

Martin, *supra*, at 75.

F. The Foreign and Domestic Decisions on the Issue Do Not Justify Use of "Last Official Price" for the Article 22 Conversion: A Summary.

The Honorable Walter Ely, Senior Circuit Judge, United States Court of Appeals for the Ninth Circuit, who sat by designation in *Boehringer Mannheim Diagnostics, Inc., f/k/a Hycel, Inc. v. Pan American World Airways, Inc.*, 531 F.Supp. 344 (S.D. Tex. 1981), appeal docketed, No. 81-2519 (5th Cir. Dec. 30, 1981), observed: "The handful of foreign tribunals that have addressed the issue have not been uniform in result." (footnote deleted). 531 F.Supp. at 352. The disarray of these decisions together with the failure of the Montreal Protocols to gain approval in this country lead only to the conclusion that

a new and more fair-minded international conference is needed. Yet TWA asserts that the foreign decisions holding for "last official price" "are entitled to considerable weight" (Brief at 22, ftn. 28), but that the foreign decisions holding for the free-market price lend "scant support" thereto because, with the exception of one case later overruled by statute, these cases "predate the dramatic fluctuations which began in 1979" (Brief at 25, ftn. 32 continuation).

Hence TWA argues that "the dramatic fluctuations which began in 1979" are alone sufficient reason judicially to alter the Article 22 limitation per kilogram from 250 gold pieces to 20 U. S. dollars. Accordingly TWA asserts only the spectre of a "widely fluctuating limit of liability" in arguing rejection of free-market price (Brief at 23). In *In Re Air Crash Disaster at Warsaw, Poland, on March 14, 1980*, the court focused on only this one factor, day-to-day stability, in rejecting free-market price. 535 F.Supp. at 842-843. In the three other domestic decisions relied on by TWA (Brief at 24-37), *Deere & Co. v. Deutsche Lufthansa A. G.*, No. 81 C 4726 (N.D. Ill. Dec. 30, 1982) simply followed *In Re Air Crash Disaster at Warsaw, Poland, on March 14, 1980*; *Maschinenfabrik Kern, A. G. v. Northwest Airlines, Inc.*, 562 F.Supp. 232, 239 (N.D. Ill. 1983), simply followed CAB Order 74-1-16; and *Electronic Memories & Magnetics Corp. v. The Flying Tiger Line, Inc.*, No. 784512 (Cal. Super. Ct., San Francisco, Aug. 25, 1982) states only an unsupported conclusion. Finally, as pointed out above (Point D.2.a.), the court of appeals rejected free-market price solely on the basis of its "daily fluctuating price" (690 F.2d at 310).

In summary, the courts holding in favor of the various airlines reject free-market price for "last official price" simply because of the deceptively appearing constancy of a fixed number of dollars. And the airlines urge the \$9.07 per pound limitation because, being less than one-fifth the value intended by the Convention delegates, it is to them a most favorable fiction. But the question here is not what unit of account a present-day international conference on private aeronautical law would choose to specify the liability limitation, or at what real value such a conference would set the limitation. As long as the Warsaw Convention is law, the limitation per kilogram is so much gold. Point A., *supra*. The only available, and proper, factor for converting the gold sums into national currencies, which factor is consistent with both the plain meaning and the purposes of Article 22, is the price of gold on the free market. Points B.-D., *supra*. It may or may not be true that Article 22's gold-based limitation is out-dated. See "A Return to Bretton Woods?" (A-1). But only when the airline industry is required to obey the law properly interpreted will it act to bring about a re-examination of that law by the due legislative process. While the courts of civil law signatories to the Convention may assume that legislative function, in the United States that function resides solely in the United States Senate. United States Constitution, Article 2, Section 2, Clause 2.

CONCLUSION

The Judgments of the United States Court of Appeals for the Second Circuit and of the United States District Court for the Southern District of New York should be reversed. The free-market price of gold, according to

the latest London fix at the time the air waybill in question is issued, should be held to be the proper conversion factor for the liability limitation laid down in Article 22, paragraphs (2) and (4), of the Warsaw Convention. This holding should be retroactive to at least pending actions involving air waybills issued after April 1, 1978. Accordingly this cause should be remanded to the United States District Court for the Southern District of New York for further proceedings in accordance with this holding.

Dated: Houston, Texas

October _____, 1983

Respectfully submitted,

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A Return to Bretton Woods?

There was some irony last week in French President François Mitterrand's call for more stable international exchange rates, for it was France as much as any other nation that was responsible for the demise of the Bretton Woods Agreement, the world's last fixed-rate currency regime. When initiated in 1944, the agreement explicitly designated the U.S. dollar as the most important currency in the world. It was declared to be worth one thirty-fifth of an ounce of gold, and other major currencies would be pegged to it. While it lasted, Bretton Woods maintained the dollar as a reasonably stable international standard and greatly facilitated the explosive growth of postwar trade.

But Bretton Woods was destined not to last. The \$35-an-ounce gold price kept the dollar artificially strong, despite erosion of its purchasing power through domestic inflation and growing economic strength among America's major trading partners. With the dollar increasingly overvalued, the United States began running persistent trade deficits. And as excess dollars started to accumulate abroad, the French government began trading them in for gold. By 1971 the situation was getting out of hand, and as growing numbers of private speculators joined the bear raid, President Richard Nixon abruptly announced that the United States was no longer in the business of selling gold.

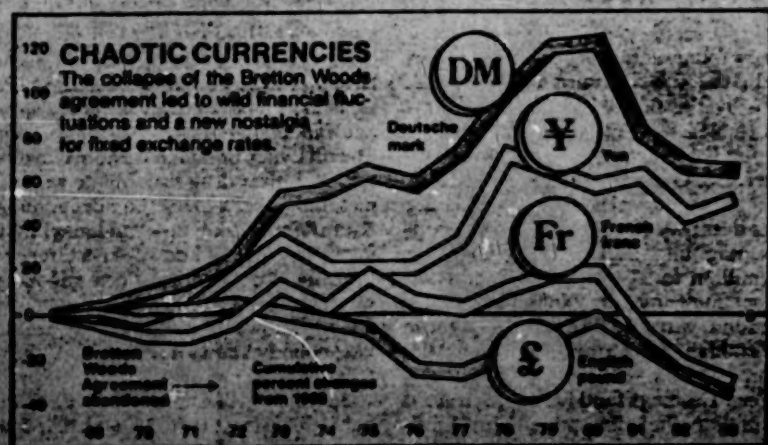
In the wake of the violent currency storms that subsequently swept the world, many international-finance experts have grown nostalgic for the good old days of Bretton Woods. But unlike Mitterrand, few believe that fixed exchange rates can soon be restored. U.S. Treasury Secretary Donald Regan says,

for example, that in 1979 former French President Valéry Giscard d'Estaing co-sponsored a European Monetary System in which eight key currencies are linked in a loosely fluctuating band. Since then, he says, the EMS, more commonly called the snake, has had to be readjusted seven times, "and those are fixed rates among nations who think alike and supposedly have similar economies. If they can't have something that works on fixed rates, how the hell can we do it worldwide?"

Goldbugs Still, a small group of American economists is attempting to persuade the government to repeg the dollar to the price of gold. Supply-side guru Arthur Laffer, for example, supports a plan in which the government announces that it will return to a gold standard three months hence and then refuses to intervene in the foreign-exchange markets or tinker with the domestic money supply. Within that time, he argues, the free market will have settled on a sustainable price for gold. From that point on, Laffer insists, the Federal Reserve Board will be forced to run a more responsible monetary policy: whenever the nation's gold stocks begin to dwindle, the Fed will be forced to tighten money to counteract an incipient inflation, and whenever people begin exchanging gold for currency, it is time for the Fed to loosen up.

While such a mechanism may be useful domestically, it will not prevent foreign-currency fluctuations caused by other governments with contrary economic policies. Currency stability cannot be created until governments learn to coordinate economic planning, and as the French example reveals, that day seems increasingly remote.

Christopher Burnich—Newsweek



OCT 12 1983

ALEXANDER L. STEVAS,
CLERK

Nos. 82-1186 and 82-1465

IN THE

Supreme Court of the United States

October Term, 1983

TRANS WORLD AIRLINES, Inc.,
Petitioner,

v.

FRANKLIN MINT CORPORATION, *et al.,*
Respondents.

FRANKLIN MINT CORPORATION, *et al.,*
Petitioners,

v.

TRANS WORLD AIRLINES, Inc.,
Respondent.

**Brief of Amicus Curiae Mark Hammerschlag and Ellen
Van Fleet in Support of Franklin Mint Corporation**

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Question Presented.

Kreindler & Kreindler, on behalf of Mark Hammerschlag and Ellen Van Fleet as *amicus curiae* will address the following question:

Whether the appellate court below properly determined that repeal of the 1973 Par Value Modification Act and the resulting elimination of gold as a unit of account in the United States and international monetary systems rendered unenforceable Article 22 of the Warsaw Convention; the Convention defines the limits of liability of air carriers for wrongful death and personal injury of passengers and cargo loss in the course of international transportation in terms of gold.

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**Brief of *Amicus Curiae* Mark Hammerschlag and Ellen
Van Fleet in Support of Franklin Mint Corporation.**

Interest of Mark Hammerschlag and Ellen Van Fleet.

We support the position of Franklin Mint Corporation that the "gold" clause of Article 22 of the Warsaw Convention¹ should be declared unenforceable.

Mark Hammerschlag and Ellen Van Fleet are plaintiffs in actions pending in the United States District Court for the Central District of California wherein each seeks damages for the wrongful death of their respective spouses as a result of the crash of a Korean Air Lines (KAL) Boeing 747 at Kimpo International Airport at the end of a trans-Pacific flight on November 18, 1980.² In its Answer to the Hammerschlag and Van Fleet complaints KAL asserted as an affirmative defense that its liability was limited by the Warsaw Convention and the Montreal Agreement.³ On February 15, 1983, the District Court substantially adopted the reasoning of the United States Court of Appeals for the Second Circuit in *Franklin Mint Corporation v. Trans World Airlines, Inc.*, 690 F.2d 303 (2d Cir. 1982) and agreed that the elimination of gold in the international and domestic monetary systems had rendered Article 22 of the Convention unenforceable.⁴

¹Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, 49 Stat. 3000, T.S. No. 876, 137 L.N.T.S. 11, reprinted in 49 U.S.C. 1502 note.

²*Mark Hammerschlag, et al. v. Korean Air Lines*, 1981 CV 1058, United States District Court, Central District of California, *sub nom In Re Aircrash at Kimpo International Airport on November 18, 1980*, MDL 482.

³Montreal Agreement, C.A.B. Agreement No. 18900, Order F-23680, May 13, 1966, 31 Fed. Reg. 7302 (1966), reprinted in A. Lowenfeld, *Aviation Law*, 971 (2d ed. Doc. Supp. 1981).

⁴*In Re Aircrash at Kimpo International Airport, Korea, on November 18, 1980*, 558 F. Supp. 72 (C.D. Cal 1983) *interlocutory appeal denied*, No. 83-8051 (9th Cir. May 10, 1983). *Kimpo* did not follow the Second Circuit's reasoning that Article 22 should be unenforceable prospectively only, finding instead that the provision was unenforceable in the pending cases.

The central questions concerning the enforceability of the gold-based limitation of liability provisions of the Warsaw Convention as presented to this Court by *Franklin Mint* are raised in the narrow context of a cargo loss, not an injury or death claim.

While the United States has long acknowledged that the Article 22 Warsaw Convention damage limit for death or injury is grossly inadequate,⁵ the treaty limitation on recovery for lost or damaged cargo has not been a matter of general concern since 1929. All the efforts to amend the treaty left the liability limits for cargo losses essentially unchanged from the dollar value equivalent of "250 francs per kilogram" specified in Article 22(2) based upon a \$42.22 per ounce gold price or lower gold value. A 1965 "denunciation" of the treaty, later withdrawn in 1966,⁶ and subsequent efforts to permit higher recoveries for Americans are evidence of the depth of United States' dissatisfaction with the low death and injury limits obtained by operation of the Convention.

Many of the signatories to the Warsaw Convention, like the United States, have required international air carriers to provide higher limits of liability for death or injury claims than those

⁵Department of State Bulletin 923 (1965); see generally, Lowenfeld and Mendelsohn, *The United States and The Warsaw Convention*, 80 Harvard L. Rev. 497 (1967); *Reed v. Wiser*, 555 F.2d 1079 (2d Cir. 1977), cert. denied 435 U.S. 922 (1977).

⁶The Department of State recalled these events as follows:

"An inter-carrier agreement, known as the 1966 Montreal Agreement, was reached and approved by the C.A.B., and the United States withdrew its denunciation.

The 1966 Montreal Agreement still governs air carrier liability under the Warsaw Convention for flights to and from the United States. Since 1966, there have been intensive efforts to modernize the provisions of the Warsaw Convention and a strong push by the United States for international agreement on limits which would adequately compensate American claimants." Minutes of Hearing Before the Committee on Foreign Relations, United States Senate, 95th Cong., 1st Sess. Executive B, July 26, 1977 at p. 6.

Foreign Air Carrier Permits are issued pursuant to 49 U.S.C. §1302.

obtained under the Convention." These "special contracts" may be interpreted as admissions that the Convention "gold" clause is outmoded at least insofar as death and injury claims are concerned. They are also evidence of a substantial lack of uniformity in the practical application of the damage limitations in the Convention. No such general reaction has been addressed to cargo losses.

"(1) Countries which quote a special rate of US \$58,000 (equal to 45,000 Special Drawing Rights).

Air Afrique Countries		Ireland	New Zealand
Australia	Israel	Panama	
Belgium	Italy	Singapore	
Burma	Japan	Spain	
Canada	Jordan	Thailand	
El Salvador	Lebanon	United Kingdom	
Finland	Luxembourg		
France	Netherlands		

(2) Countries which quote a special contract rate of 25,500 (equal to 46,400 SDRs).

Bruneri	Gibraltar	Hong Kong
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(3) Countries which quote a special contract rate in their own currencies.

Austria	Sch. 1.1m (equal to SDRs 62,400)
Denmark	Kr 375,000 (equal to SDRs 49,000)
Federal Republic of Germany	DM 150,000 (equal to SDRs 60,200)
Norway	Kr 333,000 (equal to SDRs 50,500)
Sweden	Kr. 270,000 (equal to SDRs 48,600)
Switzerland	Fr. 170,000 (equal to SDRs 75,500)

(4) The United Kingdom will be increasing its special contract limit to 100,000 SDRs as of 1 April 1981 and it is believed that France will be increasing its limit 80,000 SDRs from the same date. Other European countries are understood to be thinking of similar increases over the next few months.

All figures have been rounded to a convenient approximation in view of the day to day variations due to currency fluctuations." British Parliamentary Debates (Hansari), House of Commons Official Report, Vol. 997 No. 29 January 20, 1981.

As strong as the case is for holding Article 22 unenforceable when examined in a cargo loss perspective, it is even stronger when examined in the broader context of death and injury claims.

We respectfully submit that a decision by this Court will materially affect the unrepresented class of wrongful death and injury claimants, and accordingly request that we be permitted to address the issues before this Court from their unique and special perspective.⁸

Franklin Mint Corporation and Trans World Airlines have consented in writing to our filing of this brief as *amicus curiae*.

Summary of Argument.

1. The United States Court of Appeals for the Second Circuit properly exercised its constitutional responsibility to interpret treaties when it determined that Article 22 of the 1929 Warsaw Convention was rendered unenforceable by a subsequent Act of Congress and international agreement. The decision implements the principle that where a provision of a treaty is in conflict with an Act of Congress, the one later in time shall be controlling.⁹ It

⁸We respectfully submit that the federal courts which addressed the "gold" issue in the following cases were in error: *See Maschinenfabrik kern, A.G. v. Northwest Airlines, Inc., et al.*, 562 F. Supp. 232 (N.D. Ill. 1983) (selecting last official U.S. price of gold in cargo case); *Deere & Co. v. Deutsche Lufthansa A.G., v. Northwest Airlines, Inc., et al.*, N.D. Ill. No. 81C4726 (Dec. 30, 1982) (selecting last official U.S. price of gold in cargo case); *In Re Air Crash Disaster at Warsaw, Poland on March 14, 1980*, 535 F. Supp. 833 (E.D.N.Y. 1982) (selecting last official U.S. price of gold in passenger case), *appeal denied on that issue*, No. 82-8018 (2d Cir. Aug. 19, 1982). *Boehringer Mannheim Diagnostics, Inc. v. Pan American World Airways, Inc.*, 531 F. Supp. 344 (S.D. Tex 1981) (selecting free market price of gold in cargo case), *appeal pending* No. 81-2519 recognized that the official price of gold was no longer relevant and applicable.

⁹The foreign decisions which, according to TWA (TWA Brief p. 22 fn. 28), determined that the "official" price of gold was the appropriate Convention conversion factor are clearly distinguishable.

(Continued on following page)

also accords with the *rebus sic stantibus* doctrine which holds that where the facts and circumstances which existed when a treaty was executed and upon which its terms were predicated have substantially changed, the treaty may be declared inoperative.

2. Since 1934 when the United States adhered to the Warsaw Convention our government, through its cabinet departments and civil aviation authorities, has acknowledged that the "gold" clause of Article 22 of the Convention was directly tied to and dependent upon the domestic and international use and acceptance of gold as a monetary unit. A 1974 Civil Aeronautics Board (CAB) Order (74-1-16, 35 Fed. Reg. 1526) and subsequent statements by the Department of State make the relationship explicit. When Congress in 1976 enacted the Bretton Woods Agreement Act and repealed the Par Value Modification Act which had set a \$42.22 "official" gold price, it

(Footnote continued)

Hornlinie A.G. v. Societe' Nationale Petrole, 1972 *Nederlandse Jurisprudentie* No. 269, at 728 (JA 144), *Association Aeronautique v. Thierache*, Tr.b.gr.inst., Paris, France, Feb. 10, 1973, and *Companhia de Seguros Maritimos v. Varig*, Federal Court of Appeals, Brazil, June 3, 1975, all predate elimination of gold as the International Monetary Fund unit of account in 1978. A careful reading of *Costell v. Iberia, Lineas Aereas de Espana, S.A.*, No. 255 (Court of Appeals, Valencia, Spain, Oct. 16, 1981, reveals that a pure "official" gold value was rejected in favor of an SDR value because of "The abandonment of the classic patterns of monetary systems which are already outmoded." (TWA Brief BA 10). *Pakistan Int'l Airlines v. Compagnie Air Int'l, S.A.*, 79/2278 (Court of Appeals, Aix-en-Provence Oct. 30, 1980) (JA 133) applied the "official" gold value fixed by the governmental declaration as of August 10, 1969, since that was apparently the "official" rate when that particular contract of carriage was made. The court specifically noted that the Second Amendment to the IMF agreements (1978) "prohibiting the fixing of a gold parity as a denomination of the national currency" (JA 138) was not yet in force when the contract of carriage was made. These foreign cases do not fairly support the propositions for which they were brought to the court's attention. Instead they demonstrate an international awareness of the infirmity of Article 22 due to changes in the role of gold in the monetary system.

eliminated any statutory reference to an "official" gold value from our domestic monetary system. The same legislation ratified the elimination of "gold" as a unit of account of the International Monetary Fund and consequently from the international monetary system. After April, 1978, when the repeal became effective, there was no "official" gold value in existence by which to calculate and determine the monetary value of the Convention's damage limits. Continued use of a gold value after April, 1978 to set the limits was unjustified and conflicts with government policy.

3. Though originally designed to protect an infant industry our government has been on record for decades that the limitations of liability for wrongful death and personal injury expressed in the Warsaw Convention are unacceptably, indeed unconscionably, low. The determination by the Court of Appeals below that Article 22 is unenforceable is, therefore, consistent with this position.

4. The markedly changed economic circumstances of today from those which existed in 1929 offer further evidence that there is no justification for giving Article 22 the strained interpretation now proffered by the airlines and the United States. Their restrictive interpretation of Article 22 is neither fair to airline passengers nor required by the treaty. Air crash victims' rights to full recovery should not be compromised by an obsolete treaty provision.

5. The decision of the appellate court below was foreshadowed and anticipated by the aviation community.

6. Courts do not have the power to substitute Special Drawing Rights or any other alternative currency specie for "gold" to calculate damages under the Warsaw Convention.

7. The only available "gold" value for calculating the Convention damage limit is its market value though use of that value is not advocated by the United States or preferred. The best solution is to hold Article 22 unenforceable.

ARGUMENT.

I.

Article 22 of the Warsaw Convention limiting liability of airlines for death or injury in international transportation has been superseded and rendered unenforceable by subsequent congressional legislation, international agreements, and changed circumstances.

- A. In Interpreting Article 22 the Court Below Properly Found That the Treaty Provision Had Been Superseded by a Subsequent Act of Congress.

Federal courts have constitutional authority and responsibility to interpret treaties. *Cook v. United States*, 288 U.S. 102 (1933); *Pigeon River Improvement, Slide & Boom Co. v. Charles W. Cox, Ltd.*, 291 U.S. 138 (1934); *Wright v. Henkel*, 190 U.S. 40 (1903); *Factor v. Laubenheimer*, 290 U.S. 276 (1933). In exercising that power courts are obligated to construe treaties according to their ordinary and natural meaning, *Geofroy v. Riggs*, 133 U.S. 258 (1890), and must "ascertain the meaning intended by the parties for the terms in which the agreement is expressed, having regard to the context in which they occur and the circumstances under which the agreement was made." Restatement (2d), Foreign Relations Law of the United States §146. *Block v. Compagnie Nationale Air France*, 386 F.2d 323, 337 (5th Cir. 1967), cert. denied, 392 U.S. 905 (1968).

More than a century ago, it was determined by this Court that where provisions of a treaty and a subsequent Act of Congress are in conflict, the Act of Congress will control in United States courts as a later expression of our law.

The effect of treaties and acts of Congress, when in conflict, is not settled by the Constitution. But the question is not involved in any doubt as to its proper solution. A treaty may supersede a prior Act of Congress, and an Act of Congress may supersede a prior treaty.

The Cherokee Tobacco, 11 Wall. 616, 20 L. Ed. 227 (1870).

Congressional authority to enact a statute which supersedes or renders ineffectual the provisions of a treaty to which the United States is a party was subsequently confirmed. *Head Money Cases (Edye v. Robertson)*, 112 U.S. 580, 599 (1884); *Botiller v. Dominguez*, 130 U.S. 238 (1889).

The vitality of this principle was recently reiterated.

This Court has also repeatedly taken the position that an Act of Congress, which must comply with the Constitution, is on a full parity with a treaty, and that when a statute which is subsequent in time is inconsistent with a treaty, the statute to the extent of conflict renders the treaty null.

Reid v. Covert, 354 U.S. 1 (1955), citing *Whitney v. Robertson*, 124 U.S. 190, 194 (1888), wherein this Court stated:

By the Constitution a treaty is placed on the same footing, and made of like obligation, with an act of legislation. Both are declared by that instrument to be the supreme law of the land, and no superior efficacy is given to either over the other. . . . [I]f the two are inconsistent, the one last in date will control the other. . . .

The Warsaw Convention was opened for signature in 1929, and adhered to by the United States in 1934. The underlying purpose for the Convention at that time was to provide uniform

rules and economic protection for the infant international commercial aviation industry,¹⁰ and to limit the liability of air carrier for death or injury to passengers and cargo loss.¹¹ The treaty created a presumption of liability which could be overcome only by a showing that the loss occurred notwithstanding that the airline had taken "all necessary measures."¹² In addition, airline liability was unlimited if the loss was occasioned by the airline's "willful misconduct."¹³

Article 22 of the Warsaw Convention and Section 6 of the 1976 Bretton Woods Agreement Act, which repealed Section 2 of the Par Value Modification Act, Pub.L. 93-110, §1, 87 Stat. 353 (1973) (formerly 31 U.S.C. §449), are all concerned with "gold" in monetary systems. The 1976 statute abolished the use of gold for domestic and international monetary purposes; the Convention used gold as a basis for measuring the value of damages recoverable and the conversion of that value into national currencies. The attempt to calculate the Article 22

¹⁰Uniformity of practice and procedures within the international aviation industry, on such matters as ticketing and bills of lading, etc. can now be accomplished through the International Civil Aviation Organization which was brought into being by the Chicago Convention of 1944, reprinted in *Shawcross and Beaumont on Air Law*, 3rd ed., v.2 no. 7, 1975.

¹¹"What is made quite clear is the extent to which the delegates were concerned with creating a uniform law to govern air crashes, with absolutely no reference to any national law (except for the questions of standing to sue for wrongful death, effects of contributory negligence and procedural matters; see Articles 21, 24(2), 28(2). The delegates were concerned lest major air crash cases be brought before courts of nations whose courts were not (according to current Western standards) well organized, nor whose substantive law (according to the same standards) progressive. To avoid the prospect of a jungle-like chaos," *Reed v. Wiser*, *supra*, 555 F.2d at 1092, the Convention laid down rules that were to be universally applicable." *Benjamin v. British European Airways*, 572 F.2d 913, 917 (2d Cir. 1978). See, Lowenfeld and Mendelsohn, *The United States and The Warsaw Convention*, 80 Harv.L.Rev. 497 (1967).

¹²Warsaw Convention Article 20(1).

¹³Warsaw Convention, Article 25.

damage limit in terms of a gold value, after April 1, 1978, when the legislation became effective, places the 1929 treaty and later statute in direct conflict. It also calculates damages by reference to a "national" law (and a repealed national law at that) which was always anathema to those who drafted the Convention and its adherents.¹⁴

The fact that the 1976 Bretton Woods Agreements Act does not make express reference to the Warsaw Convention is not a legitimate basis for denying the existence of a conflict. The historical relationship between gold as a monetary unit and the Convention confirms the conflict, and makes it clear that the decision of the court of appeals below had long been foreshadowed and anticipated.¹⁵

Use of the \$42.22 gold value for certain official non-transactional accounting purposes by some international development banks or even by the United States in setting a book value for its gold reserves does not demonstrate the

¹⁴See n.11 *supra*; see n.20 *infra*.

¹⁵"It is clearly established that the airlines knew that 'a rational limit on liability cannot exist' without an internationally agreed upon unit and 'the Montreal meeting in 1975 was a recognition by the Warsaw parties that the Convention's unit had been eliminated.' Therefore, airlines, including Korean, presumptively knew that this 'international disarray' would prevent the Convention from shielding them in any rational manner, and they would be expected to protect themselves and obtain additional insurance.

Furthermore, the knowledge of this 'international disarray' and the 'recognition by the Warsaw parties that the Convention's unit had been eliminated by events,' contrary to the holding in *Franklin Mint*, would allow the airlines to see—as early as 1975—that, eventually, a court would refuse to enforce the Convention. Therefore, this Court's decision as to the enforceability of the Convention is applicable to this action." *In re Aircrash at Kimpo International Airport on November 18, 1980, supra*, 558 F.Supp. at 75.

absence of a conflict between the treaty and the subsequent statute.¹⁶

There is a complete absence of proof—or even argument in any of the briefs submitted in this case—that the \$42.22 gold price has practical transactional significance today which affects people or nations except, of course, the Warsaw Convention.

In light of the foregoing principles the argument by TWA and the United States that the Court below “abrogated” the Convention (TWA Brief p. 15, U.S. Brief p. 13) is unfounded. By applying the principles governing treaty analysis the court below concluded that subsequent legislation and events have rendered the challenged treaty provision unenforceable. The court has merely recognized and reacted to legislative and other historical developments.¹⁷ The court did not void the Warsaw Convention; it merely held one provision inoperative.

Authority to conduct the foreign relations of the United States is committed by the Constitution to the Executive and the legislative branches of government. There was no invasion of this role by the appellate court. The Bretton Woods Agreement Act was enacted in 1976 in furtherance of our nation's foreign

¹⁶We note the reference to “articles of agreement” of certain international development banks at TWA Brief p. 17 n.24 and 18 n.24. Each of the development banks mentioned was chartered by international agreement or treaty between 1945 and 1965. Consequently, the reference to subscriptions in terms of “gold” is fully understandable when those “banks” were founded. TWA candidly acknowledges that the change to SDRs for valuation of the Work Bank's capital stock was an “internal” matter. (TWA Brief p. 17 n.24). The fact that after 1978 the World Bank “will continue to accept capital subscriptions . . . at the last par value of the U.S. dollar” is totally irrelevant to the issue before this Court. None of its articles of agreement limit the rights of individuals. They relate to accounting procedures peculiar to that institution.

¹⁷The inter-relationship between the Executive, Legislative and Judicial branches of our government is demonstrated in *Goldwater v. Carter*, 481 F.Supp. 949, reversed 617 F.2d 697, vacated 444 U.S. 996 (1980).

policy as was the Warsaw Convention in 1929. The foreign policy decision to remove "gold" from its role in monetary systems conflicts with the earlier foreign policy decision to rely upon a "gold" value to limit airlines' liability. Whatever "political questions" were raised by the "gold" issue were resolved by Congress and the Executive not by the courts. Thereafter, a court which recognizes, accepts, and acts in a manner consistent with these foreign policy judgments is properly exercising its judicial function. See, *Van Der Weyde v. Ocean Transport Co.*, 297 U.S. 114 (1936).

Furthermore insofar, as the "foreign policy" argument of the United States is concerned (U.S. Brief p. 2), the comments of Justice Powell in *Dames & Moore v. Regan*, 453 U.S. 654, (1981) citing *Armstrong v. United States*, 364 U.S. 40 (1960) are in point.

The Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar the Government from forcing some people alone to bear public burdens which, in all fairness and justness, should be borne by the public as a whole.

453 U.S. 654 at p. 691. No showing has been made in the court below or in this Court to justify using victims of air crashes to further the foreign policy interests of the nation.

The argument in the United States' brief herein supporting the use of the \$42.22 repealed "official" gold value is a change from public positions our government has taken (*infra* pp. 15-23). The alteration in its public stance may be the reaction of some who mistakenly misperceived or disregarded the dramatic changes which affected international monetary affairs and the Convention which portend the end of antiquated and unnecessary airline industry protectionism.

**B. Holding Article 22 to be No Longer
Enforceable Properly Applies the
Rebus Sic Stantibus Doctrine**

The changed role of gold in domestic and international monetary systems coupled with the development of the airline industry since 1929 makes doctrine of *rebus sic stantibus* operative in this case.

[This is a] name given to a tacit condition, said to attach to all treaties, that they shall cease to be obligatory so soon as the state of facts and conditions upon which they were founded has substantially changed. Taylor, Int. L. §394; 1 Oppenheim, Int. L. 550; Grotius, ch. XVI, §XXV; Vattel B. 2, c. 13, §200; Hall, Int. L. §116; Hershey, Int. Pub. L. 319 2 Bouvier's Law Dictionary 2820 (unabridged 3d Rev., 1914) Black's Law Dictionary 1139 (5th Ed. 1979).

One commentator has described the doctrine as follows:

Although the doctrine of *rebus sic stantibus* is based upon the idea of a relation between the binding force of the treaty and a continuance of a state of facts essentially unchanged, because the parties intended that the continuance of the state of facts should be a condition of the binding force of the treaty, two variations of this concept may be distinguished. In the one case, a tacit clause *rebus sic stantibus* is presumed to be contained in every treaty. In the second case, no such tacit clause is presumed in every treaty; but if, upon examination, it is clear that a particular treaty was entered into with reference to the existence of a particular state of facts, the continued existence of which was envisaged by the parties as a determining factor moving them to undertake the obligations stipulated, then the rule of *rebus sic stantibus* applies . . .

Hackworth, Digest of International Law, Vol. V, §511 at p. 349; see also, Hill, the doctrine of "*Rebus Sic Stantibus*" in International Law, IX Univ. of Missouri Studies 7 (1934).

The fact that treaties are "contracts" among nations, *Dreyfus v. Von Flinck*, 534 F.2d 24, 29 (2d Cir. 1976), *Cert. denied*, 429 U.S. 825 (1977), which should be interpreted like other contracts, 87 C.J.S., Treaties §13, underscores the point that since the facts and circumstances which led to defining the Article 22 damage limits in terms of "gold" have been materially altered by economic developments, international agreements and domestic legislation the provision should no longer be enforced.¹⁸

In applying these various principles we believe the court below and the district court in *Kimpo* were mindful of the admonition that treaties must be "liberally" construed to effect their intended purpose.

Factor v. Laubenheimer, *supra*, at p. 293-294, *Valentine v. United States, ex rel. Neidecker*, 299 U.S. 5, 57 S.Ct. 100 81 L.ed. 5 (1936).

The *rebus sic stantibus* doctrine and the policy favoring liberal treaty interpretation require that in 1983 the judicial focus should favor a treaty construction which does not hurt, but rather helps American airline passengers.

C. The United States Has Acknowledged That the Application of Article 22 Was Linked to and Dependent Upon "Gold" as a Unit of Account in the Domestic and International Monetary Systems

The Warsaw Convention limitation of liability for death or personal injury was stated to be "125,000 francs", and each franc was deemed to refer to a French franc consisting of "65 milligrams of gold at the standard of fineness of nine hundred

¹⁸See, *Prepakt Concrete Co. v. Augusto Menendez Const. Corp.*, 293 F.Supp. 638 (D.P.R. 1968) for application of this doctrine in a commercial contract dispute.

thousandths." The treaty limit for cargo was "250 francs per kilogram."¹⁹

There is no disagreement that the damage limitations were to be calculated in terms of "gold" because the parties to the treaty were determined to have an "international value" rather than one created or determined by national law.²⁰ Gold was selected because it was then the accepted standard unit of account for international monetary transaction and was an appropriate measure for currency conversion.²¹ Use of a gold value was also consistent with the Convention's drafters' intent of utilizing a *uniform* international standard which would respond to inflation.²²

The Gold Clause Cases, 294 U.S. 240 (1935) demonstrate that prior to the date legislative restrictions were imposed upon the

¹⁹"When these two Conventions were drafted, the French franc actually had the gold-value stated in the definition, after its value had been established in 1928 by Poincare. For this reason, it is often referred to as the Poincare gold franc. The drafters of the Convention wisely fixed the gold value of the unit used, whilst leaving to France the satisfaction of the French franc being taken as a basis." Drion, *Limitation of Liabilities in International Air Law*, Martinus Nijhoff, The Hague 1954, p. 182.

²⁰A Swiss delegate to the Warsaw Convention said,

"We must base ourselves on an *international* value, and we have taken the dollar. Let one take the gold French franc, it's all the same to me, but let's take a gold value." (R. Horner & D. Legrez, Second International Conference on Private Aeronautical Law, Minutes, Warsaw, October 4-12, 1929, at 89-90 (1975).)

²¹The \$42.22 gold price has *not* been an "international" value since 1978. TWA agrees that use of a gold franc clause in 1929 "is readily understandable when it is considered in light of the international gold exchange system in existence when the Convention was drafted." (TWA Brief p. 6.)

²²"These increases in the limit of liability show that these limits and the adoption of gold francs as an *imaginary unit of account* was agreed upon not only in order to achieve uniformity among all the contracting parties, but also in order to provide adequate compensation and"—in the words of Asser—"to protect their real value." Heller, *The Value of the Gold Franc—A Different Point of View*, 6 J. Mar. L. & Com. 73, 76 (1976).

use of gold clauses in private agreements by the Gold Reserve Act of 1934, 12 U.S.C. §411 *et seq.*, 48 Stat. at L. 337, they were popular in commercial agreements and debt instruments to protect against depreciation and against discharge of an obligation by payment of less than the bargained-for value.²³

The United States has acknowledged the *direct* relationship between the role of gold as a monetary unit and the Warsaw Convention.

The United States routinely responded to increases in the price of gold by correspondingly raising the limitations of liability for death or injury spelled out in Article 22. When the Gold Reserve Act of 1934 set the U.S. "official" price of gold at \$35 per ounce the "125,000 francs" Convention damage limit had a value of \$8,291.87. In 1971 the U.S. "official gold price" was raised to \$38 per ounce, 1972 Pub.L. No. 92-268, 86 Stat. 116 (1972) and the damage limit was recalculated to be \$8,666 by the CAB.

A further devaluation of the U.S. dollar was accomplished in 1973 by enactment of the Par Value Modification Act increasing the "official" price of gold to \$42.22. The Civil Aeronautics Board again reacted to the 1973 increase in the "official" gold price by issuing its CAB Order 74-1-16. The CAB explicitly ruled that the change in the price of gold *in the monetary system* had the effect of requiring that the Convention damage limit for death and injury be raised to \$10,000. This 1974 Order on its face *confirms* the long-standing *direct relationship* between the statutes regulating the gold value and the Convention:

The liability limits in the Warsaw Convention are set forth in terms of gold francs so that as long as the value of the dollar in terms of gold remained constant, no

²³"We also think that, fairly construed, these clauses were intended to afford a definite standard or measure of value, and thus to protect against a depreciation of the currency and against the discharge of the obligation by a payment of lesser value than that prescribed. When these contracts were made they were not repugnant to any action of the Congress." *Norman v. Baltimore & Ohio Railroad Company*, 294 U.S. at p. 302.

change was required in the dollar amount of the liability limits contained in the tariffs. However, by Order 72-6-7 adopted June 2, 1972, the Board directed the carriers to revise their tariffs to reflect the devaluation of the dollar in terms of gold from \$35 per ounce to approximately \$38 which took place effective May 8, 1972, and such revisions have been made. On September 21, 1973, Public Law 93-110 was enacted further devaluating the U.S. dollar to approximately \$42.22 per ounce of gold effective October 18, 1972. As a result, the minimum liability limits specified in Order 72-6-7 and the tariffs currently on file with the Board no longer meet the minimum liability limits of the Convention and a revision of the tariffs is necessary to accurately reflect such limits in dollars.

CAB Order 74-1-16, Docket No. 26274, 39 Fed. Reg. 1526 (JA 55).²⁴

The Jamaica Accords²⁵ gave the elimination of gold as a monetary unit its formal international dimension.²⁶

The reaction of the Department of State (DOS) to the elimination of gold in the international and domestic monetary system²⁷ and its effect on the Warsaw Convention was predictable and publicly stated. DOS advised the Senate Committee on Foreign Relations in 1977 as follows:

²⁴The statement in the TWA brief at p. 19. "The Par Value Modification Act has always been totally unrelated to the effectiveness of the Warsaw Convention and, therefore, its repeal is necessarily irrelevant to the treaty's continued viability" is plainly wrong.

²⁵Second Amendment of Articles of Agreement of the International Monetary Fund, Apr. 1, 1976, 29 U.S.T. 2203, T.I.A.S. No. 8937 effective April 1, 1978.

²⁶See, 1976 U.S. Code Cong. and Admin. News, Vol. 5, p. 5938 for the legislative history of the Bretton Woods Agreements Act.

²⁷See, Vol. 1, *Report to the Congress of the Commission on the Role of Gold in the Domestic and International Monetary Systems*, March, 1982.

*A further development affecting the Warsaw Convention occurred in the early 1970's. The role of gold in the international monetary system was diminished, and the period experienced the development of a new monetary unit for financial transactions, the Special Drawing Right, or SDR, of the International Monetary Fund. The limits of liability in the Guatemala City Protocol, as well as in the other Warsaw instruments, are expressed in gold. The United States, seeking to take advantage of the schedule of the 1975 Montreal Conference, pressed for expansion of its agenda to include consideration of an SDR provision to replace the gold clause in the Guatemala City Protocol. (Emphasis supplied.)*²¹

The Senate Committee on Foreign Relations confirmed these observations, but went further. The committee recognized that the role of gold "would end", and that a new method of currency conversion would have to be found.

In the period preceding the 1975 Montreal Diplomatic Conference, it also became apparent that the role of gold as the basis for world currency conversion would end. Since Article 22 of the Convention (as amended both by The Hague and Guatemala City Protocols) provides for conversion of the liability limits to national currencies on the basis of the "poincare franc"—a measure of gold equivalency—it became apparent that a new method for currency conversion would have to be found.

²¹Minutes of Hearing Before the Committee on Foreign Relations, United States Senate, 95th Cong. 1st Sess., Executive B, July 26, 1977, p. 7; *The Guatemala City Protocol*, done March 8, 1971, reported in A. Lowenfeld, *Aviation Law* 975 (2d ed. Doc. Supp. 1981) was a protocol to increase the Warsaw Convention damage limit to the dollar equivalent of \$100,000; see, *Reed v. Wiser*, 555 F.2d at p. 1084.

Executive Rept. 97-45. Report of the Committee on Foreign Relations, United States Senate, Montreal Aviation Protocols Nos. 3 and 4, December 16, 1981 p. 3-4.²⁹

The Civil Aeronautics Board has *not* taken the position that the gold clause of Article 22 remains enforceable. Three CAB staff memoranda, however, have been written on the subject, but none of them constitutes an order or decision of the Board.³⁰ Nevertheless, they do demonstrate the awareness of the United States' civil aviation authorities of the relationship between statutory changes and IMF adjustments in the value and role of gold to the Convention.

The March 18, 1980 memorandum authored by the CAB Chief, Policy Development Division (the Kennedy Memorandum) in fact stated:

During the early 1970's, the carriers and many governmental aviation authorities foresaw the effects that the changing role of gold could have on the interpretation of provisions like Article 22.³¹

²⁹The antipathy of Congress to "gold clauses" is further evidenced by 31 U.S.C. §5118 which updated the government's refusal to permit their enforcement. Pub.L. 97-258, 96 Stat. 985, Sept. 13, 1982.

³⁰P. Kennedy, Memorandum, Policy Development Division, Bureau of Consumer Protection, Civil Aeronautics Board (Mar. 18, 1980) (JA 42); J. Gaynes, Memorandum, Legal Division, Bureau of International Aviation, Civil Aeronautics Board (Apr. 18, 1980) (JA 60); J. Golden "Warsaw Convention Liability Limits," Memorandum, Director, Bureau of Compliance and Consumer Protection, Civil Aeronautics Board (May 20, 1981) (JA 33).

³¹Highlighting the relationship between IMF action and Article 22 of the memorandum continued: "Under the original Articles of Agreement of the IMF, each member country was obliged to establish a par value for its currency, expressed in terms of gold or the U.S. dollar (the value of which was expressed in terms of gold) for the official settlement of international currency transactions. Pursuant to this requirement, the United States established a par value of the dollar as \$35 per fine troy ounce of gold. In 1972 and again in 1974, (Continued on following page)

The May 20, 1981 staff memorandum (The Golden Memorandum) concluded that the CAB should continue to observe the "legal fiction" inherent in the \$42.22 gold value, while noting "In 1975, the Warsaw signatories attempted to deal with the changes in the role of gold in international monetary transactions." (JA 39.)

Commenting on the May 20, 1981 CAB Memorandum, the Court of Appeals below observed:

The CAB order on which Judge Knapp relied was expressly permitted on the existence of an official price under the Par Value Modification Act of 1973. The more recent internal CAB memorandum supporting continuation of that order is based ultimately on a policy determination that the last official price is the best available standard. The inconsistency of the CAB position, however, is starkly evident. It rejects SDR's because the Senate has not ratified the Montreal Protocol, while adopting the last official price of gold which has been explicitly rejected by the Congress. The sole criterion supporting the CAB's position appears to be the law of inertia.

690 F.2d at 309-310.

In October of 1974, *before* the elimination of gold from the international monetary scene, the Legal Committee of the International Civil Action Organization ("ICAO") Legal Committee issued a resolution to clarify Article 22 at a time when there was a two-tier gold value system—an official price and a market

(Footnote continued)

Congress passed legislation that changed the par value of the dollar. *In each case, the Board ordered corresponding adjustments to carrier tariffs, raising the liability limits to convert the limits of the Convention, expressed in terms of gold, to U.S. dollars.*" P. Kennedy, Memorandum, Policy Development Division, Bureau of Consumer Protection, Civil Aeronautics Board (Mar. 18, 1980) p. 2.

price—from which to choose.³² At that time, when an “official” \$42.22 gold price was still in limited formal use, the resolution constituted an acknowledgment by ICAO of the pressing “gold” problem which Article 22 presented. The 1974 ICAO Legal Committee interpretation of Article 22 does not support the claim that *after* 1978, use of \$42.22 gold value is proper. Even if the ICAO Legal Committee took such a position it would not be binding on this court.

Continued use of the \$42.22 value has also been recognized as inconsistent with the intent of the Convention’s drafters who used a gold value to maintain the value of currency in times of inflation.³³ The present market value of gold is nearly ten times the 1973 gold price.

³²The Legal Committee of ICAO, Resolution Concerning the Conversion of Poincare Francs to National Currencies in the Warsaw and Rome Conventions, 1974. Cited at TWA brief p. 25 n. 32.

³³“As long as the official price of gold existed and remained fairly constant, the Warsaw limitations remained close to the level considered adequate to cover passenger claims filed with airlines back in the 1930’s. The limits for death and personal injury increased with the approval of the Montreal Agreement. But baggage liability limits, which started out at \$7.62 per pound in 1934, have not risen appreciably since that time. Following the devaluation of the dollar in 1972, they went up to \$8.16 per pound, and in 1974 they increased to the present level of \$9.07 per pound. For a hypothetical 44-pound lost suitcase, the maximum amounts the carrier would have to pay a claimant were \$330, \$359 and \$400, respectively. During this period, however, the value of the dollar declined. In terms of purchasing power, three hundred thirty 1934 dollars were worth \$1,031 in 1972, \$1,215 in 1974 and \$1,920 in January, 1980.

The liability limits increase dramatically if the calculations are based upon the market value of gold.

While the figures for baggage liability limits based on the market value of gold are probably in excess of the value of most passengers’ checked belongings, the limits on death and personal injury claims are lower than amounts received by many plaintiffs in wrongful death actions.” The Kennedy Memorandum (JA 47-49).

See also, H. Drion, *Limitations of Liabilities in International Air Law*, 1954, p. 183.

Day v. Trans World Airlines, 528 F.2d 31, 35-36 (2d Cir. 1975), *cert. denied*, 429 U.S. 890 (1976), made the observation that:

"The conduct of the parties subsequent to ratification of a treaty may, thus, be relevant in ascertaining the proper construction to accord the treaty's various provisions."

The conduct of our government since 1929 relating international monetary changes and IMF action to Article 22, therefore, is strong support for the position we advocate.

Even the federal courts which have recently accepted the \$42.22 "fictive" gold value for Article 22 purposes (albeit we submit, mistakenly) have appreciated the historical relationship between the Warsaw Convention's gold clause and its use within the monetary system, e.g., *In re Air Crash Disaster of Warsaw, Poland on March 14, 1980*, 535 F.Supp. at 842; *Machinefabrick Kern, A.G., v. Northwest Airlines*, 562 F.Supp. at 237-38. *Boehringer Mannheim Diagnostics v. Pan American Airlines*, 531 F.Supp. at 349-53, while converting the Article 22 damage limit to dollars based upon the free market value of gold, also recognized the direct relationship.

**D. Declaring the Article 22 Damage Limits
Unenforceable is Consistent With Our
Government's Rejection of the Low Limits
of Recovery Resulting From the Gold Value
Clause**

Whatever the rationale which led to United States acceptance in 1934 of the low damage limits for injury and death specified in Article 22 of the convention, it has long been apparent that American victims of air crashes were being grossly under-compensated and that the treaty was an anachronism.

When the Convention was concluded in 1929, only two years after Lindbergh's historic flight, international air

travel was in its infancy. We are living in a different world and airlines were no doubt thought to need assistance in developing international air travel. There can be little doubt, however, that the framers of the Convention included the requirements mentioned in view of what my brother Desmond has termed the "drastic restrictions" of the Convention. They were drastic even in 1929. Injury or death from negligence of the carrier was fixed at 125,000 "French franc consisting of 65½ milligrams of gold at the standard of fineness of nine hundred thousandths," art 22, par (4), or \$8,29187. Since then our dollar has been devaluated 40% so that the total amount recoverable for injury or death due to negligence is less in 1929 dollar value than \$5,000.

Ross v. Pan American Airways, 299 N.Y. 88, 85 N.E. 2d 880 (1949) (Conway, J. dissenting).

The United States has sought to secure higher recoveries for passengers for decades. In 1955, many of the subscribers to the Convention became parties to the Hague Protocol which doubled the Article 22 limits to 250,000 francs or \$16,600 for death or injury cases. The United States objected, taking the position that "The central defect in the Warsaw convention is its low limit of liability."³⁴

One of the proposals advanced by the United States in 1966 included uniform rules *with no limit of liability*.³⁵

³⁴Hearings Before the Committee in Foreign Relations, 89th Cong., 1st Sess., Exec. H, at 15 (May 26-27, 1965).

³⁵"In the summer and fall of 1965, efforts were made by the United States to obtain support for increasing the Warsaw limits to \$100,000 per passenger. These efforts were unsuccessful, and the United States announced that it would withdraw from the Convention. Notice of denunciation was deposited in November 1965, to take effect in May 1966. At the same time the United States announced that it would be willing to withdraw the denunciation if, before it was to (Continued on following page)

When the Guatemala City Protocol reached the Senate floor for a vote on March 8, 1983 in the form of Montreal Potocols #3 and #4, the Senate refused to give its "advice and consent" to ratification. This refusal, according to the Department of State, could trigger "denunciation" of the treaty. During the 1977 Hearing before the Senate Foreign Relations Committee, the Department of State spokesman indicated as much during an exchange with the Committee Chairman.

"The Chairman: Should the United States choose not to ratify protocols 3 and 4, is it the intention of the executive branch to withdraw altogether from the Warsaw Convention?

Mr. Hansell: I think the answer to that is difficult at this time to forecast, Mr. Chairman. I think we would have to look very seriously at the question of denouncing the convention if these protocols were not approved, but no decision has been taken on that question."

See n.35 at p. 28.

Against this record it cannot fairly be claimed that the consequences of holding Article 22 unenforceable would conflict with any policy of the United States and were not foreseeable.

(Footnote continued)

take effect, there were a reasonable prospect of an international agreement on a limit of liability in the area of \$100,000 *or on uniform rules with no limit of liability*, and if, pending the entry into force of such international agreement, a provisional arrangement were concluded among the principal international airlines which would waive the Warsaw limits up to \$75,000 per passenger."

S. Executive Rept. B, 95th Cong., 1st Session, Committee on Foreign Relations, Dec. 16, 1981, p. 2.

As the 1977 and 1982 Foreign Relations Committee hearings recount even before the Guatemala Protocols were signed in 1971, the \$100,000 limit was recognized to be grossly inadequate. Opponents of the treaty argued that no limit is required for an industry which can readily procure low cost insurance coverage to protect itself from all risk, and 50 senators agreed that the latest expressions of the Warsaw scheme should not be ratified.

E. Preservation of the "Official" Price of Gold for Warsaw Convention Purposes is Anti-Competitive and Contravenes One of the "Goals for International Aviation Policy" Set Forth in 49 U.S.C. §1502(b)

49 U.S.C. §1502(b) provides, in part:

(b) Goals for international aviation policy.—in formulating United States international air transportation policy, the Congress intends that the Secretary of State, the Secretary of Transportation, and the Civil Aeronautics Board shall develop a negotiating policy which emphasizes the greatest degree of competition that is compatible with a well-functioning international air transportation system.

The policy of promoting competition in international aviation is consistent with domestic goals articulated in the Airline Deregulation Act of 1978, Pub.L. 95-504, Oct. 24, 1978, 92 Stat. 1705.

Allowing airlines to perpetuate the Convention damage limitation at \$42.22, the lowest conceivable level under the treaty, would violate the mandate of Congress to promote competition in international aviation.

The CAB is on record that the new government policies favoring competition significantly impact upon the continued justification for the Warsaw Convention scheme.

Enactment of the Airline Deregulation Act of 1978, Public Law 95-504, October 24, 1978, and the International Air Transportation Competition Act of 1979, Public Law 96-192, February 15, 1980, both of which were aimed at removing governmental intervention from aviation as much as possible, creates a totally different atmosphere than existed in 1977.

Statement of the Civil Aeronautics Board Before the Committee on Foreign Relations submitted September 27, 1981, at p. 3.¹⁶

II.

The market value of gold is the only gold value which, arguably, may be utilized to calculate the Article 22 damage limitation, but its use is not favored.

We do not believe that use of the market value of gold to establish airline's limits of liability under Article 22 is the best resolution of the conflict, but we are obligated to comment that it is a gold value which would satisfy a literal reading of Article 22(4).

The court of appeals below found the free market value of gold inconsistent with the intent of the contracting parties. 690 F.2d at 310. The United States agreed. (U.S. Brief, p. 25.)

However, in *Zakoupolos v. Olympic Airways*, No. 256/1974 (Feb. 15, 1974), for example, the Court of Appeals (3d Department) in Athens, Greece decided that the fair market price of gold as set on the Athens Bourse was the appropriate valuation for liability limits of the Warsaw Convention.

Likewise, in *Saga v. Sagoland* (Lower Court, Goteberg, Sweden, Oct. 2, 1973) cited in Heller, *The Value of the Gold*

¹⁶TWA's passing reference (TWA Brief p. 21 n.27) to the Price-Anderson Act, Pub.L. No. 85-256, 71 Stat. 576 (1957) and *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59 (1978) is irrelevant to the point of the issue before the Court. Price-Anderson created a \$560-million fund for recovery, accompanied by an express statutory commitment to "take whatever action is deemed necessary and appropriate to protect the public from the consequences of a nuclear accident. . . . to be a fair and reasonable substitute for the uncertain recovery of this magnitude from a utility. . . ." 438 U.S. at 90-91. The Warsaw limits liability offer no parallel assurances by the government.

Franc—A Different Point of View, 6 J. Mar. L. & Com. 91, 99-100 (1976) and in Larsen, *Legal Problems in Compensation Under the Gold Clauses of Private International Law Agreements*, 63 Geo. L. J. 817, 825 (1975), the Court held that the fair market price of gold was the appropriate valuation for liability limits of the Warsaw Convention. See also, Boehringer, *supra*, p. 6.

The fair market value ensures that claimants are to some extent, within the framework of the Convention damage limits, protected against the vicissitudes of inflation. Therefore, application of the market price rather than the "official" price of gold would further our government's policy that aircraft accident victims' recoveries, although unfairly restricted by treaty, should not be further diminished by inflation.

Special Drawing Rights are clearly not an alternative conversion factor for Warsaw Convention purposes. The court below correctly observed:

The Convention itself contains not the slightest authority for its use and the Senate has thus far declined to ratify the Montreal Protocols.

690 F.2d at 310.

We respectfully submit that given the alternative methods by which the Article 22 damage limitations may be calculated, the choice is quite narrow. SDR's and any national currency are unavailable alternatives. The market value of gold is available, but is not a favored alternative. Logic and fairness, therefore, support the best alternative, which is to hold Article 22 unenforceable.

Conclusion.

For the foregoing reasons, we respectfully urge this Court to affirm the judgment below of the United States Court of Appeals for the Second Circuit to the extent that it held that Article 22 of the Warsaw Convention unenforceable and modify the judgment to the extent that it held the treaty enforceable prospectively only.

Respectfully submitted,

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1983

TRANS WORLD AIRLINES, INC.,

Petitioner,

—against—

FRANKLIN MINT CORPORATION, FRANKLIN MINT
LIMITED, and MCGREGOR, SWIRE AIR SERVICES
LIMITED,

Respondents.

FRANKLIN MINT CORPORATION, FRANKLIN MINT
LIMITED, and MCGREGOR, SWIRE AIR SERVICES
LIMITED,

Petitioners,

—against—

TRANS WORLD AIRLINES, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

**BRIEF AMICUS CURIAE OF INTERNATIONAL
AIR TRANSPORT ASSOCIATION IN SUPPORT OF
PETITIONER TRANS WORLD AIRLINES, INC.**

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August 29, 1983

Question Presented

Whether the separation of powers doctrine derived from U.S. Const. Art. II, § 2, cl. 2, was violated by the decision below of the U.S. Court of Appeals for the Second Circuit holding on non-Constitutional grounds that the cargo liability limitation of Article 22 of the Warsaw Convention, a treaty of the United States, is prospectively unenforceable in United States courts, even though no act of Congress abrogated the United States' adherence to the Convention and both Congress and the Executive Branch have treated the Convention liability limitations as binding and enforceable?

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1983

Nos. 82-1186 and 82-1465

TRANS WORLD AIRLINES, INC.,

Petitioner,

—against—

FRANKLIN MINT CORPORATION, FRANKLIN MINT
LIMITED, and MCGREGOR, SWIRE AIR SERVICES
LIMITED,

Respondents.

FRANKLIN MINT CORPORATION, FRANKLIN MINT
LIMITED, and MCGREGOR, SWIRE AIR SERVICES
LIMITED,

Petitioners,

—against—

TRANS WORLD AIRLINES, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

**BRIEF AMICUS CURIAE OF INTERNATIONAL
AIR TRANSPORT ASSOCIATION IN SUPPORT OF
PETITIONER TRANS WORLD AIRLINES, INC.**

Statement of Interest

This brief *amicus curiae* is submitted with the written consents of both parties to this case pursuant to Rule 36(2) of the Rules of the Court; these consents have been filed with the Court.

The International Air Transport Association (IATA) is an organization of 123 international air carriers, many of whom either represent or are more than 50% owned by foreign sovereign nations that are parties to the Warsaw Convention.¹ A list of IATA members, six of which are U.S. airlines, has been filed in App. I (at 66a).²

Because most of IATA's member carriers transport cargo (and passengers) to and from the United States and are subject to litigation in U.S. courts,³ they are vitally affected by the decision below. IATA's member carriers carry on their day-to-day business in reliance upon the Convention framework, and they and their respective governments depend upon the good faith enforcement of its provisions by the United States. The Convention greatly facilitates international air commerce and establishes

¹All references to "Warsaw Convention" or "Convention" are to the Convention for the Unification of Certain Rules Relating to International Transportation by Air, October 29, 1934, 49 Stat. 3000, T.S. 876, 137 L.N.T.S. 11 (a treaty adhered to by the United States October 29, 1934 and by 126 foreign nations; reprinted in Appendix D to IATA's Petition for Leave to Intervene, etc. ("App.") at 26a).

²The purpose of IATA and its member airlines is (1) to promote safe, regular, and economical air transportation for the benefit of the peoples of the world, to foster air commerce, and to study problems connected therewith; (2) to provide a means for collaboration among air transportation enterprises engaged in international air transport and services; and (3) to cooperate with the International Civil Aviation Organization (ICAO), an arm of the United Nations, and other international organizations.

³If the air waybill is issued in the United States or the destination is the United States, they may be subject to suit here even if they are inter-line carriers. See Article 30(3) of the Convention.

uniform and predictable commercial criteria important to the conduct of business in international air cargo transportation. The Judicial nullification of the liability limitation provisions will severely and adversely affect IATA's members in their conduct of international air commerce.

Summary of Argument

I. By declaring the Warsaw Convention's cargo liability limitation unenforceable despite its unquestioned Constitutionality, the Court of Appeals has eviscerated the Convention and violated the Constitution's separation of powers doctrine.

A. The court disregarded the intent of the Convention's contracting parties. In order to facilitate international air transportation, the Convention establishes a relatively predictable, reliable, and consistent basis for resolving liability and damage disputes. The carriers are made presumptively liable for loss, damages, or delay of cargo shipments, in exchange for which the carrier's liability is limited. Negotiated as a balanced package of which the limitation of liability provision was a critical part, these and other provisions in the Convention were designed to prevent inconsistent local and national laws and rules from hindering international air commerce, either by creating unacceptable uncertainty and confusion among the airlines and shippers as to their rights and obligations or by exposing airlines to unlimited liability (and associated legal costs) imposed by legal systems whose procedures are unfamiliar and inconsistent. The changing world monetary situation has caused some transitory differences as to the standard of conversion to apply to the Convention's liability limitations, but, both in their court decisions and in their international negotiations, the parties have revealed a continuing commitment to the limitation of liability. Ignoring its duty to interpret the Convention so as to render it enforceable, the Court of Appeals has made *any* expression of liability limits unenforceable. Nothing could be further from the intent of the parties, including the United States.

B.1. The Court of Appeals has needlessly and improperly interfered with the United States' relations with its treaty partners and has undermined this country's diplomatic credibility. It is up to the executive and legislative branches to determine whether or not changed circumstances will be taken as making the provisions of a treaty no longer obligatory on the United States. The Court of Appeals should not be allowed to isolate the United States from its treaty partners or, since there has been no formal denunciation, expose the United States to sanctions or liability for breach of its treaty obligations. The absence of a formal denunciation reveals the political branches' desire to continue enforcement of the Convention and to avoid the severe commercial and diplomatic consequences of not enforcing this binding treaty.

B.2. No Congressional legislation has contradicted or superseded the Convention. Repeal of the Par Value Modification Act of 1973 did not mean that the official price of gold had been abandoned for all purposes; repeal did not preclude use of that price as the Convention's unit of conversion in this country. The legislative history makes no mention of the Convention; instead, it recognized that the official price of gold would continue to be used in various contexts, especially for international purposes. Basic principles of treaty and statutory interpretation do not permit the finding of an intention to abrogate or modify the Convention.

B.3. Furthermore, the Civil Aeronautics Board (CAB) has been given the authority by Congress to insure that international air transportation tariffs are lawful, and it has long approved tariff limitations expressed according to the official price of gold. This well-known practice, which continues to this day, has been acquiesced in by Congress, and it raises a presumption of Congressional consent to enforcement of the Convention's limitation of liability provisions in terms of the official price of gold.

Both Congress and the Executive Branch have continued to

treat the Convention liability limitations as binding and enforceable. Other parties to the Convention have consistently done the same. Thus, the decision of the Court of Appeals did not follow the applicable legal principles and was based on faulty reasoning; the decision should be reversed.

Argument

I. Failure to Enforce the Limitation of Liability Provisions of the Warsaw Convention Is a Violation of the Constitution's Separation of Powers Doctrine.

Under the separation of powers doctrine, the Judiciary may not abrogate or terminate a part of a Constitutional treaty⁴ unless it finds this part of the treaty has been unquestionably superseded by subsequently enacted conflicting legislation that was clearly, definitely, and specifically in contemplation of the treaty superseded.⁵ While professing its adherence to this basic principle, the Court of Appeals did precisely what it said it could not do.⁶ It created, in effect, a judicial reservation to an existing treaty. In doing so, it also interjected the Judiciary into the delicate process of negotiating modifications to the Convention framework, a matter that the Constitution quite clearly dele-

⁴*Cf. Goldwater v. Carter*, 481 F. Supp. 949 (D.D.C.), *rev'd*, 617 F.2d 697 (D.C. Cir.), *vacated*, 444 U.S. 996 (1979); *Geofroy v. Riggs*, 133 U.S. 258, 267 (1890); *Reid v. Covert*, 354 U.S. 1, 16-17 (1957); *Terlinden v. Ames*, 184 U.S. 270 (1902); *Doe ex dem. Clark v. Braden*, 16 How. 635, 657 (1853). There was no suggestion by the Court of Appeals in *Franklin Mint* of any constitutional infirmity in the Warsaw Convention.

⁵*Whitney v. Robertson*, 124 U.S. 190, 194 (1888). See *Cook v. United States*, 288 U.S. 102, 120 (1933); *United States v. Lee Yen Tai*, 185 U.S. 213, 22 S. Ct. 629, 632 (1902); *Union Pacific Railroad v. United States*, 99 U.S. 700, 718 (1879); *Valentine v. United States*, 299 U.S. 5, 10-11 (1936).

⁶It claimed to recognize that "it is not the province of courts to declare treaties abrogated. . . ." 690 F.2d at 311, n.26.

gates to the political branches of the United States Government. In addition, the Court of Appeals ignored the principle that the judiciary's role in interpretation of treaties⁷ is "limited to giving effect to the intent of the Treaty parties." *Sumitomo Shoji American, Inc. v. Avagliano*, 457 U.S. 176 (1982). In the present controversy over the proper unit of conversion to be used for evaluating the Convention's limits of liability, analysis of the intent of the parties, including the United States,⁸ requires use of the United States' last official price of gold (or, in the alternative, Special Drawing Rights).

A. The Parties to the Warsaw Convention Intend to Limit the Liability of Air Carriers in International Transportation

After the United Nations Charter, the Warsaw Convention (App. D) is the most widely adopted international treaty.⁹ It was signed by the original parties in 1929 and has been continuously adhered to by the United States since 1934.¹⁰

The principal purpose of the framers of the Convention was to establish a uniform body of world-wide rules relating to, and limiting liability for, carriage of passengers and cargo in international air transportation.¹¹ The Convention establishes a relatively predictable, reliable, and consistent basis for resolving lia-

⁷U.S. Const. Art. III, §2, cl. 1.

⁸See Brief Amicus Curiae of the United States on Petition for Writ of Certiorari, at 15.

⁹A. Lowenfeld, *Aviation Law*, §4.1, at 7-98 (2d ed. 1981).

¹⁰Because it is self-executing, it needed no supplementary Congressional legislation to bring it into force. *Indem. Ins. Co. of North America v. Pan American Airways, Inc.*, 58 F.Supp. 338 (S.D.N.Y. 1944); *Garcla v. Pan American Airways, Inc.*, 269 A.D. 287, 55 N.Y.S. 2d 317, *aff'd*, 295 N.Y. 852, 67 N.E. 2d 257, *cert. denied*, 329 U.S. 741 (1946). See *Bacardi Corp. v. Domenech*, 311 U.S. 150, 161 (1940).

¹¹See Brief for Trans World Airlines, Inc. ("TWA"), "Statement of the Case".

bility and damage disputes arising from such transportation.¹² The carrier is made presumptively liable for loss, damage, or delay of cargo (Article 18),¹³ and the *quid pro quo* is the limitation of its liability under Article 22 of the Convention.¹⁴ The Convention provides that all such claims arising under its provisions can only be brought subject to its provisions (Article 24). It also sets forth notice of claim procedures (Article 26) and establishes the jurisdictions where claims may be adjudicated (Article 28).

Negotiated as a balanced package of which the limitation of liability provision was a critical part,¹⁵ these provisions were designed to prevent the crazy-quilt of inconsistent local and national laws and rules from hindering international air commerce, either by creating unacceptable uncertainty and confusion among the airlines and shippers as to their rights and obligations or by exposing airlines to unlimited liability (and associated legal costs) imposed by legal systems whose procedures are unfamiliar and

¹²To this end, the Warsaw Convention defines the international transportation to which it applies (Article 1), the ticket and baggage check requirements for passengers (Articles 3 and 4), the air waybill requirements (Articles 5, 6, 7, and 8), the contractual implications of the cargo air waybill (Articles 9, 10, and 11), the rights of the consignor (shipper) and consignee (Articles 12, 13, 14, and 15), and certain customs requirements (Article 16).

¹³And as to passengers and their baggage (Article 17).

¹⁴See *Reed v. Wiser*, 555 F.2d 1079, 1089 (2d Cir.), cert. denied, 434 U.S. 922 (1977); *Block v. Compagnie Nationale Air France*, 386 F.2d 323 (5th Cir. 1967), cert. denied, 392 U.S. 905 (1968); Lowenfeld and Mendelsohn, *The United States and the Warsaw Convention*, 80 Harv. L. Rev. 497, 499-500 (1967). See generally *Minutes, Second International Conference on Private Aeronautical Law*, Warsaw, October 4-12, 1929 (Horner and Legrez trans. 1975). The presumptions of fault are contained in Articles 17-21 and Article 25 of the Convention.

¹⁵The importance of the balance is reflected in the Convention's reservation clause, which does not permit a country to issue any reservation except with respect to international transportation by air performed directly by the states.

inconsistent.¹⁶ The Convention enables cargo to be shipped almost anywhere in the world on a single air waybill, pursuant to interline agreements based on the Convention. It has also made these shipments more economical by clearly allocating the risks of shipping and carrying cargo, thus minimizing overlapping liabilities (and the costs of disputing them) and avoiding unnecessary duplication of insurance coverage among those who are not self-insured.¹⁷ This lowers the costs to everyone involved in international air cargo transportation and, ultimately, also lowers the costs to the consumers of products and parts that are shipped internationally by air.

The decision of the Court of Appeals conflicts with the "familiar rule that the obligations of treaties should be liberally construed so as to give effect to the apparent intention of the parties." *Valentine v. United States*, 299 U.S. 5, 10 (1936); *Nielson v. Johnson*, 279 U.S. 47, 51 (1929).¹⁸ In giving effect to that intention under changed circumstances, the Judiciary is to examine the conduct of the parties subsequent to ratification of the Treaty in order to ascertain the Treaty's proper construction. See *Pigeon River Improv. Slide and Boom Co. v. Charles*

¹⁶It should be noted that the United States legal system, consisting of fifty-plus jurisdictions with differing laws differently interpreted, generates its own internal inconsistencies, often unpredictably. For example, in this very case the Court of Appeals' far-reaching holding was neither sought, discussed, nor contemplated by any of the litigants, and most subsequent federal court decisions have not followed this holding. The Supreme Court is, of course, the final arbiter of these inconsistent approaches.

¹⁷Of course, under the Convention a shipper can avoid the liability limitation and shift the risk to the airline by simply declaring the full value of the cargo and paying an additional charge.

¹⁸Prior to *Franklin Mint*, the Second Circuit had followed this rule in Convention cases. See *Benjamins v. British European Airways*, 572 F.2d 913, 918 (2d Cir. 1078), cert. denied, 439 U.S. 1114 (1979); *Reed v. Wiser*, 555 F.2d 1079 (2d Cir.), cert. denied, 434 U.S. 922 (1977); *Day v. Trans World Airlines, Inc.*, 528 F.2d 31, 35 (2d Cir. 1975), cert. denied, 429 U.S. 890 (1976), reh'g denied, 429 U.S. 1124 (1977).

W. Cox, Ltd., 291 U.S. 138, 153-63 (1934); *Kolovrat v. Oregon*, 366 U.S. 187, 192-194 (1961).

As recognized by the Court of Appeals for the Second Circuit in *Day v. Trans World Airlines, Inc.*, 528 F.2d 31, 38 (2d Cir. 1975), *cert. denied*, 429 U.S. 890 (1976), *rehearing denied*, 429 U.S. 1124 (1977), the delegates to the Warsaw Convention knew that in years to come civil aviation would change in unforeseen ways, yet "they wished to design a system of air law that would be both desirable and flexible enough to keep pace with these changes." The contracting parties accepted the inevitability of future modification of the agreement but committed themselves to make those adjustments within the Convention's basic framework.

One hundred and twenty-seven countries have agreed on the enduring need for the limitation of liability provisions and the related provisions described above.¹⁹ Under any view, the contracting parties have manifested an intent to maintain the vitality of the Convention, including the limitation of liability concept, despite the ambiguities caused by the changing world monetary situation. Both in court decisions²⁰ and in international negotia-

¹⁹As a major exporter and importer, the United States has a special interest in seeing that these provisions remain in effect; more than those of most of other countries, American businesses are heavily involved in international air commerce and are dependent upon the Convention's provisions that make this commerce practical and economical.

²⁰The following foreign cases demonstrate that foreign courts will select a Warsaw unit of conversion despite shifting currency bases: *Costell v. Iberia, Lineas Aereas de Espana, S.A.*, No. 255, First Civil Court of Appeals of Valencia (October 14, 1981) (reprinted in Appendix to TWA's Brief, "BA" 5); *Kislinger v. Austrian Airtransport*, No. IR 145/83 (HG) Wien (Commercial Ct. of App. of Vienna, June 21, 1983) (BA 11); *Rendezvous-Boutique-Parfumerie Friedrich & Albine Breitingier G.m.b.H. v. Austrian Airlines*, No. 14 R 11/83 (LG) Linz (Court of Appeals of Linz, June 17, 1983) (BA21); *Pakistan International Airlines v. Compagnie Air Inter S.A.*, No. 79/2278, Court of Appeals of Aix-en-

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tions concerning monetary limits,²¹ the parties' conduct reveals a continuing commitment to limitation of liability.

To be sure, there are some differences among foreign courts as to the proper standard of conversion to apply to the Convention liability limitations. The Court of Appeals made much of this "disarray"; however, the court revealingly ignored the question of whether this so-called disarray reflects any intent of the contracting parties to have unlimited liability. Quite obviously, it does *not* reflect any such intent.

Indeed, the disarray noted by the Court of Appeals is nothing when compared with the chaos that would be created if the United States, which is involved in a substantial portion of the world's international air commerce, enforced no liability limit whatsoever. The Draconian decision to make any monetary ex-

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Provence, France (October 30, 1980) (reprinted in Joint Appendix, "JA" 133); *Hornlinie A.G. v. Societe Nationale Petroles Aquitaine*, Supreme Court of the Netherlands, 7 Eur. Trans. L. 933 (1972) (JA 114); *Companhia de Seguros Maritimos v. Varig*, Federal Court of Appeals of Brazil (June 3, 1975); *Kuwait Airways Corp. v. Sanghi*, Bangalore, India (August 11, 1978) (JA 179); *Balkan Bulgarian Airlines v. Tammaro*, Court of Milan, Italy (October 25, 1976) (JA 176); *Fida Cinematografica v. Pan American World Airways*, Rome Civil Court, Italy (October 13, 1966); *Linee Aeree Italiane v. Riccioli*, No. 609/79, Rome Civil Court, Italy (November 14, 1978) (JA 97); *Florencia Cia Argentina de Seguros S.A. v. Varig S.A.*, Buenos Aires, Argentina, 1977 Uniform L. Rev. 198 (August 27, 1976) (JA 169); *Zakapoulos v. Olympic Airways Corp.*, No. 256/74, Court of Appeal, 3d Dep't Athens, Greece (February 15, 1974) (JA 165). Cf. *Chamie v. Egyptair*, No. 80-12,428, Cass. civ. com., France (March 7, 1983) (BA1).

²¹See, e.g., the Hague Protocol, 478 U.N.T.S. 371 (1955); the Montreal Agreement, CAB Agreement No. 18990, 31 Fed. Reg. 7302 (1966); the Guatemala City Protocol (1971), reprinted in A. Lowenfeld, *Aviation Law, Documents Supplement* at 975-984 (2d ed. 1981); the Montreal Protocols Nos. 3 and 4 (1975), reprinted in A. Lowenfeld, *Aviation Law, Documents Supplement* at 985-1001 (2d ed. 1981) (see n. 37 *infra*).

pression of the Convention's cargo liability limit unenforceable is farther from what was intended by the framers and signatories than any of the options rejected by the Court of Appeals.

The decision of the Court of Appeals destroys just what the Convention was designed to achieve. The above-described practical and economic advantages of the Convention would be irreparably undermined,²² with far-reaching manifestations.²³ For

²²In recognizing the problems that would result from nullifying the Convention limitation of liability, the Court of Appeals suggested that the filing of reformulated tariffs with the CAB might establish a new limit of liability. 690 F.2d at 312. The suggestion is unrealistic. International tariffs must be reciprocally consistent. Their reformulation would involve innumerable intricacies and unavoidable delays. In some countries, new enabling legislation, new operating agreements, and new regulatory approvals may have to precede amendment of conditions of contract and air waybills by foreign air carriers. Tariff reformulation in this country would also be subject to a time-consuming process and would not necessarily be successful. Even if new tariffs and new procedures were ultimately permitted, they would not have the permanence or recognition of a treaty provision. They would also be subjected to burdensome legal challenges covering the issues mentioned above, as well as additional issues relating to, *inter alia*, the continued viability of the presumption of liability under Article 18 of the Convention; the required content of new notices of liability limitations; the effect of deregulation's abolition of domestic tariffs and the concomitant potential unavailability of constructive notice of liability limitations on domestic legs of international carriage (see note 47, *infra*); and the effect of possibly inconsistent findings on similar issues by courts of various jurisdictions, domestic and foreign. Indeed, Franklin Mint's attorney has already suggested that, in the absence of a Convention limit, any tariff attempting to limit liability would be unenforceable under the Convention. Remarks of John Foster, Esq., Luncheon of the Air Transportation Law Committee and the Water Transportation Law Committee of the Federal Bar Association, December 7, 1982, Washington, D.C.

²³In fact, *Franklin Mint* has already been applied in a personal injury case as the basis for a holding that the Convention's limits on liability for personal injury are not enforceable in United States courts. See *In re*

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example, there are thousands of international air cargo claims each year, and, because of the limitation provisions, almost all of these cargo claims have been settled. However, the decision below will make settlement much more difficult²⁴ and dramatically increase the number of cases filed, litigated, and ultimately tried.²⁵

The many severe consequences of not enforcing the Convention provide reason enough for courts to follow the recognized principle that, when nations have agreed upon a treaty, it cannot be disregarded. Here, the Court of Appeals ignored its duty to interpret the Convention so as to render it enforceable. There can be no question but that the contracting parties intended, and still intend, to limit the liability of international air carriers because the limitation is critical to the Convention's balance and to the very uniformity, stability, predictability, and reliability that the Convention was designed to provide.

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Air crash at Kimpo International Airport, Korea on November 18, 1980, 558 F. Supp. 72 (C.D. Cal. 1983), interlocutory review denied, No. 83-8051 (9th Cir. May 13, 1983). For a number of reasons in addition to those outlined in the present cargo case, the *Kimpo* holding is unsound. And if this Court permits the unenforceability holding to be asserted in passenger cases, the upheaval and adverse foreign government reaction would be greatly magnified.

²⁴With the presumption of liability and the *quid pro quo* of limitation thereon, the issues and proof of a claim are limited. If the Convention were not in existence, proof of delivery, events, defenses, etc., would complicate the issues and the facts in every case.

²⁵If the failure to enforce the liability limits results ultimately in foreign diplomatic action terminating the Convention, United States courts will also find themselves faced with many cases that, under Article 28 of the Convention, would have to have been instituted elsewhere.

B. Both Congress and the Executive Branch Consider the Limitation of Liability Provisions of the Warsaw Convention To Be Binding and Enforceable

1. The Court of Appeals Has Improperly Interfered with the Political Branches' Conduct of Foreign Relations

The Constitution reserves to the executive branch the power to negotiate and make treaties, with the advice and consent of the Senate.²⁶ The primacy of the political branches in the conduct of the Nation's foreign relations has always been a cornerstone of the Federal Judiciary's self-restraint.

The executive and legislative branches are in a better position than the Judiciary to assess not only the need for a treaty but also the potential diplomatic and commercial problems that would be caused by withdrawal from a treaty. It is up to the executive and legislative branches to determine whether or not changed circumstances, such as violation by other parties, will be taken as making the provisions of the treaty no longer obligatory on this country. See, e.g., *Taylor v. Morton*, 23 Fed. Cas. 784, 787 (No. 13,779) (Cir. Ct. Mass. 1855); *The Chinese Exclusion Case*, 130 U.S. 581, 602 (1889).

The Court of Appeals, unlike four other federal courts,²⁷ ignored the obvious intent of the United States to maintain the

²⁶U.S. Const. Art. II, §2, cl. 2.

²⁷See *Maschinenfabrik Kern, A.G. v. Northwest Airlines, Inc., et al.*, 562 F. Supp. 232 (N.D. Ill. 1983) (selecting last official U.S. price of gold in Warsaw cargo case); *Deere & Co. v. Deutsche Lufthansa A.G.*, N.D. Ill. No. 81 C 4726 (Dec. 30, 1982) (selecting last official U.S. price of gold in Warsaw cargo case); *In Re Air Crash Disaster at Warsaw, Poland on March 14, 1980*, 535 F.Supp. 833 (E.D.N.Y. 1982) (selecting last official U.S. price of gold in Warsaw passenger case), *appeal denied on that issue*, No. 82-8018 (2d Cir. Aug. 19, 1982); *Boehringer Mannheim Diagnostics, Inc. v. Pan American World Airways, Inc.*, 531 F. Supp. 344 (S.D. Tex. 1981) (selecting free market price of gold in Warsaw cargo case), *appeal pending*, No. 81-2519.

Convention's liability limitation despite the transitory difficulties thus far in setting the conversion standard. By declaring that the limitation of liability provision of the Convention is unenforceable in "United States Courts",²⁸ the Court of Appeals unilaterally took, in effect, precisely the action that the political branches declined to take when, as discussed below, rather than denounce this treaty, they determined to work with other nations for its modernization.

Courts "should hesitate long before limiting or embarrassing" the sovereign powers of the United States, particularly as they concern foreign affairs. *MacKenzie v. Hare*, 239 U.S. 299, 311 (1915), quoted in *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 322 (1936). The Court of Appeals' decision would isolate the United States from its treaty partners²⁹ and place in doubt whether this nation "speaks with one voice" with respect to foreign affairs. See *Michelin Tire Corp. v. Wages*, 423 U.S. 276, 285 (1976); *Department of Revenue of Washington v. Association of Washington Stevedoring Cos.*, 435 U.S. 734, 752-53 (1978); *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 449 (1979). Striking a pivotal part of the Convention would adversely affect the United States' initiatives and commitments in negotiations for modernization of the Convention and, indeed, in other international negotiations.³⁰

²⁸690 F.2d at 304.

²⁹The United States is regarded as an important party to the Convention because of the relative size of its aviation industry and its relatively large share of the international air traffic, but as this Court noted in *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 9 (1972), the day is long past when our courts can adhere to the "parochial concept" that "trade and commerce in world markets and international waters [be] exclusively on our own terms, governed by our law, and resolved in our courts." See also *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 516, *reh. denied*, 419 U.S. 885 (1974).

³⁰The United States itself has, in its Brief Amicus Curiae on the Petition for Writ of Certiorari in the present case, at 2, stated:

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In addition to creating problems of diplomatic credibility, the failure to enforce the limitation of liability provisions of a treaty that the United States continues to regard as binding³¹ would also constitute a clear violation of the United States' obligations under the Convention and may subject this country to diplomatic retaliation and, more directly, to sanctions for breach of its treaty obligations. In other words, aside from entitling other parties to terminate the Convention or to suspend its operation in whole or in part, this material breach may also subject the United States to liability for reparations for damages sustained if, despite the absence of a formal denunciation by the United States, a foreign international air carrier is held liable for damages above the Convention limit.³²

The potential commercial and diplomatic consequences are so severe that any intent of the political branches of government not to enforce the limitation of liability provisions of the Convention would be reflected first in extensive negotiations and then, if the negotiations were futile, in formal steps toward denunciation pursuant to Article 39 of the Convention. This is, of course, exactly what happened in 1965 when the United States

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This decision, if allowed to stand, will have significant adverse consequences for the United States both in its immediate application to the Warsaw Convention and in its broader implications for the treaty obligations of this country generally.

As evidence of this, the Solicitor General pointed out, at 2-3:

The Department of State informs us that several foreign governments have expressed their view that the Court of Appeals' decision will seriously affect United States relations in international aviation.

³¹Brief Amicus Curiae of the United States on Petition for Writ of Certiorari, at 2.

³²*Cf.* 14 Whiteinan, *Digest of International Law* §27, at 285 (1970); V Hackworth, *Digest of International Law* §486, at 165 (1943).

decided that the Convention's limitation of liability for passenger injuries and death was too low.³³

Thus, both logic and history demonstrate that formal denunciation should be a prerequisite to any judicial decision declining to enforce the critical limitation of liability provisions in the Convention. To date, there has been no such denunciation. Furthermore, there has not even been any expression of Congressional or executive *intent* to denounce the Convention.

2. No Congressional Legislation has Contradicted or Superseded the Convention

The Court of Appeals held that United States courts are prevented from enforcing the Convention's limits on liability be-

³³Because of historical concern in the United States about the Convention limits of liability for passengers (but not for cargo), the U.S. has striven over the years to persuade the Warsaw parties to revise upwards those limits. The Hague Protocol, Sept. 28, 1955, 478 U.N.T.S. 371, the result of a 1955 conference of the Warsaw parties, doubled the Warsaw limit of liability for bodily injury or death (cargo limitations were not an issue). It was signed but never ratified by the United States. See generally A. Lowenfeld, *Aviation Law*, pp. 7-100-127 (2d ed. 1981). On November 15, 1965 the United States gave formal notice of denunciation of the Convention because of the parties' unwillingness to agree to increase sufficiently the bodily injury or death limit (again, cargo limitations were not the rationale). 50 Dep't State Bull. 923 (1965). In the wake of the adoption of the Montreal Agreement, the U.S. withdrew its notice of denunciation on May 13, 1966. 54 Dep't State Bull. 955-57 (1966). The Montreal Agreement, raising the limitation of liability of the Warsaw Convention to \$75,000 for passenger injury or death on flights to and from the United States, was filed with and approved by the CAB on May 13, 1966 as an interim measure pending amendment of the Convention. CAB Agreement 18990. Cargo limitations of liability were not changed by the Montreal Agreement, for it was recognized that the limitations were only an issue between businessmen. Whatever the monetary limits, shippers could declare the full value of the cargo, thereby avoiding the liability limitations and putting the risks of loss or damage on the airlines, or they could take on the risks themselves, then either "self-insuring" those risks or arranging for insurance coverage (with appropriate deductibles).

cause repeal of the Par Value Modification Act of 1973³⁴ constituted "an explicit abandonment of the previously established unit of conversion" in the Convention.³⁵ This holding is superficial at best. The repeal did not mean that the official price of gold had been abandoned for all purposes and did not preclude its use as the Convention's unit of conversion in this country.³⁶ Neither the legislative history of the Par Value Modification Acts nor that of the statute of repeal makes any mention of the Convention. In fact, the legislative history of the repealing act reflects the Senate's recognition that there were other purposes for which the official price would still be used for determining the monetary value of gold. It was noted that the "only *domestic* purpose for which it is necessary" was to determine the value of gold held in the form of gold certificates. See 690 F.2d at 308, n.11. The clear inference was that there were other *international* purposes, but this was overlooked by the Court of Appeals. 690 F.2d at 309, n. 20, referring to n. 12 (*sic*; it should be n. 11). Clearly, the issue in this case is international, not domestic. In the first place, then, there is no basis for concluding that repeal of the Par Value Modification Acts was intended to affect the Convention in any way; second, there is even less basis for concluding that this repeal was intended to abrogate and make unenforceable the Convention's limitation of liability provisions.

Moreover, even if there were *some* arguable basis for finding such an intent, basic principles of treaty interpretation require a stronger basis than is available here. "[T]he intention to abrogate or modify a treaty is not to be lightly imputed to Congress." *Pigeon River Improv. Slide and Boom Co. v. Charles W. Cox*,

³⁴Par Value Modification Act, Pub. L. No. 92-268, 86 Stat. 116 (1972), amended by Par Value Modification Act, 31 U.S.C. §449 (1973), repealed 1976 by Pub. L. No. 94-564, 90 Stat. 2660. The repealing Act was enacted in 1976 but became effective April 1, 1978.

³⁵690 F.2d at 331.

³⁶The discussion in the United States' Brief Amicus Curiae on Petition for Writ of Certiorari, at 10-14, of the background and effect of the repeal of the Par Value Modification Act is particularly incisive.

Ltd., 291 U.S. 138, 160 (1934), quoted in *Menominee Tribe of Indians v. United States*, 391 U.S. 404, 413 (1968).

A treaty will not be deemed to have been abrogated or modified by a later statute unless such purpose on the part of Congress has been clearly expressed.

Cook v. United States, 288 U.S. 102, 120 (1933). Furthermore, as has been stated regarding the rule established in *Cook*:

This familiar rule should be strictly applied because relations with other countries are directly affected. Courts should be more hesitant to find that statutes of Congress modify or abrogate treaty provisions than to find that they repeal existing legislation because Congress was not the principal draftsman or actor in making the treaty part of the "supreme law of the land."

Itzcovitz v. Selective Service Local Board No. 6, N.Y., 301 F. Supp. 168, 181 (S.D.N.Y. 1969), *appeal dismissed*, 422 F.2d 828 (2d Cir. 1970).

Therefore, if Congress had intended a result as drastic as disemboweling the world's second-most widely adopted treaty, it is reasonable to expect that it would have said so expressly. *See, e.g., Itzcovitz v. Selective Service Local Board No. 6, N.Y., supra; McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10 (1963).

That the Senate has thus far not ratified the Montreal Protocols²⁷ by a two-thirds vote is also no reflection of an intent to

²⁷Montreal Protocols 3 and 4 encompass the Guatemala City Protocol, which was drafted in February-March 1971 and which called for unbreakable limits of liability (liability without fault) of 1,500,000 Poincare francs for passenger injury or death and 15,000 francs for baggage. There was no proposed change to the cargo limitations.

(Footnote continued on following page)

denounce the Convention. Furthermore, the Executive branch continues strongly to support ratification and the Senate has not completed its consideration of the Protocols.³³ (Any disagreement between the political branches of the United States government regarding the Protocols would simply emphasize the inappropriateness of judicial intervention into this country's continuing relationship with the other signatories of the Convention.) The Senate's handling of the Protocols is relevant to the issues herein in one important respect—the debates reveal that the Senate clearly had the understanding that the Convention's liability limits were binding and enforceable (as modified by the Montreal Agreement). In the discussions about limiting liability, there was no suggestion by any Senator that Congress had already abrogated these limitations.

(Footnote continued from previous page)

Montreal Protocols 3 and 4, when in force, establish Special Drawing Rights (SDRs) as the unit of conversion for Poincare francs in Article 22(4) of the Convention. They would also raise the limit of liability for death or injury to 100,000 SDRs (approximately \$105,000 today) and provide for individual nations' establishment of a Supplemental Compensation Plan for passenger death or injury. The unincreased limit for loss or damage to cargo would be 17 SDRs (approximately \$18) per kilogram, regardless of fault.

³³The United States, through the Executive branch, was a principal architect in the formulation of these protocols, and it signed them in 1975. They were forwarded to the United States Senate for advice and consent on January 14, 1977. See S. Exec. Rep. No. 45, 97th Cong., First Sess., at 3-7 (1981). A vote was taken on March 8, 1983; the Senate did not at that time obtain the required two-thirds majority in favor of ratification of Montreal Protocols 3 and 4. Fifty senators voted in favor, with forty-two against. After the vote was taken, the majority leader moved for reconsideration, and, consequently, the matter remains on the Senate calendar. 129 *Cong. Rec. S.* 2279 (daily ed. March 8, 1983). U.S. ratification would be subject to establishment of an adequate Supplemental Compensation Plan, as reviewed and approved by the CAB. S. Exec. Rep. No. 45, 97th Cong., 1st Sess., at 3-7 (1981).

Accordingly, the record shows that Congress has taken no action adversely affecting the viability of the Warsaw Convention or any specific provision thereof. The Convention, in its entirety, remains the law of the land.

3. Congress and the Executive Have Sanctioned Enforcement of the Convention's Liability Limits Using the Official Price of Gold

Under these circumstances, there is another basic principle of treaty interpretation that is relevant. A long-continued practice under a treaty, known and acquiesced in by Congress, raises a presumption of Congressional consent to it. *Dames and Moore v. Regan*, 453 U.S. 654 (1981) (citing *United States v. Midwest Oil Co.*, 236 U.S. 459, 474 (1915)). Consequently, it is significant that historically, and particularly since 1965, both the executive and legislative branches have looked to and relied upon the Civil Aeronautics Board (CAB) to deal with Convention issues involving limitations of liability.³⁹ Congress has delegated to the CAB authority to coordinate and review international airline matters and agreements⁴⁰ and the power and

³⁹Over the years, the CAB has also been responsible for implementing other provisions of the Convention and its Protocols, particularly in recent years while coordination of the Montreal Protocols was in progress. For instance, in 1966 the Executive branch deferred to the CAB for review and approval of the compromise Montreal Agreement, CAB No. 18990, as an interim measure pending negotiation and ratification of a new treaty. And at the Senate hearings regarding the Montreal Protocols, the Senate Foreign Relations Committee received the views of the Board regarding the status of the Supplemental Compensation Plan (prepared pursuant to the Montreal Protocols), which is still pending before the CAB. See *Civil Aviation Protocols: Hearing Before the Committee on Foreign Relations, United States Senate*, 97th Cong., 1st Sess., at 6-8 (1981). Indeed, the Senate Foreign Relations Committee is looking to the CAB for a reevaluation of the proposed Supplemental Compensation Plan (See CAB Order 77-7-85) (July 20, 1977) as a condition subsequent to ratification; i.e., it would come into force *only* if the CAB makes a favorable determination. See S. Exec. Rep. No. 45, 97th Cong., 1st Sess. (1981).

⁴⁰49 U.S.C. §§1382 and 1386.

duty to investigate and ensure that the tariffs governing foreign air transportation, including the limitation of liability for cargo carriage, are lawful, fair, and reasonable; and to suspend any tariff found to be unlawful.⁴¹ These responsibilities of the CAB must, however, be carried out consistently with any treaty obligation of the United States.⁴² Since the Warsaw Convention is self-executing, the method of converting the Poincare franc into "lawful money of the United States"⁴³ pursuant to Article 22(4) of the Convention has clearly become a tariff function within the Board's rulemaking role under the Federal Aviation Act.⁴⁴

Pursuant to its statutory mandate, the CAB has continually applied the official price of gold as the appropriate tariff conversion standard for cargo (and other) limits of liability under the Convention.⁴⁵ Indeed, contrary to the Court of Appeals' as-

⁴¹49 U.S.C. §§1374(a) and 1482.

⁴²49 U.S.C. §1502.

⁴³49 U.S.C. §1373(a).

⁴⁴49 U.S.C. §1301 *et seq.*

⁴⁵See App. D at 36-37a. Article 22(2) of the Convention would limit TWA's liability in the present case to \$6,475.98 (250 francs per kilogram) because there was no special declaration of a higher value. The aforementioned franc is the "Poincare franc", which by conversion into U.S. dollars per pound at the last official U.S. price of gold (\$42.22 per troy ounce) amounts to a limitation of liability of \$9.07 per pound (or approximately \$20 per kilogram). See CAB Order 74-1-16 (January 3, 1974), 39 Fed. Reg. 1526 (1974) (App. F at 48a); and CAB Order 78-8-10 (August 3, 1978), 43 Fed. Reg. 35971 (1978) (App. G at 52a). See also 14 C.F.R. §§221.175 and 176. The Court of Appeals apparently mistakenly believed that application of the official rate of gold to Convention limitations was derived solely from the Par Value Modification Act of 1973 and its predecessor. When the Par Value Modification Act adjusted the official rate of gold, the CAB directed the carriers to apply the new rate of conversion in their tariffs. The power to mandate use of the official price was derived from the Federal Aviation Act (see CAB Order 72-6-7, June 2, 1972) and not from the Par Value Modification Act. In issuing that Order, the CAB took into consideration a num-

(Footnote continued on following page)

sumption, more than two years after the Jamaica Accords and the legislation repealing the Par Value Modification Act of 1973, and more than four months after that legislation became effective on April 1, 1978, the CAB valued the cargo limit according to the official price of gold.⁴⁶ To this day, international air cargo tariffs⁴⁷ filed with and approved by the CAB express Convention liability limits according to the last official price of gold.⁴⁸

(Footnote continued from previous page)

ber of policy factors (of which the Par Value Modification Act was only one), including the continuing application of the Convention. Accordingly, legislation repealing the Par Value Modification Act should not be taken to have precluded the CAB's approval of use of the last official price of gold in air carrier tariffs governed by the Convention.

⁴⁶The CAB stated, with respect to IATA Conditions of Cargo Carriage, "At the present time a carrier's liability for Warsaw traffic . . . is \$20 per kilogram. . . ." CAB Order 78-8-10 (August 3, 1978) (App. G. at 52a).

⁴⁷As of January 1, 1983, under "deregulation," U.S. air carriers no longer file domestic air cargo liability tariffs. 14 C.F.R. §399.

⁴⁸However, the CAB has also accepted airline tariffs consistent with the Warsaw Convention and Montreal Agreement using SDRs to measure their liability. *See, e.g.*, Passenger Rule Tariff No. PR-3 (CAB No. 55), Rule 25(D)(1)(a)(ii) (May 30, 1983). Indeed, SDRs have been supported as a unit of conversion by the United States government in connection with the Montreal Protocols. It appears that the Court of Appeals was not aware of the Detailed Report of the United States Delegation to the ICAO International Conference on Air Law, Sept. 1975, to revise Montreal Protocols 3 and 4 to the Warsaw Convention. That report demonstrates that it was the United States that urged the use of SDRs as the unit of conversion for the Montreal Protocols.

SDRs have also been supported as a unit of conversion by the United States in pending non-aviation treaties. *See, e.g.*, United Nations Convention on the Carriage of Goods By Sea (The Hamburg Rules), U.N. Doc. A/CONF. 89/13 (30 March 1978) (limit of liability unit of conversion in SDRs for loss of international maritime cargo (to supersede the Brussels Convention)). The SDR is a unit of account in no less than 15 international conventions (some of which are in effect). Merren, *The*

(Footnote continued on following page)

Furthermore, despite changes in the use of gold as a currency base and the ongoing Convention amendment process, the latest CAB staff memorandum as to the appropriate unit of conversion affirms the selection of the last official U.S. price of gold by CAB Order 74-1-16 (App. F at 48a):

[T]he Board's current course of action [use of the official U.S. price of gold as a unit of conversion] is superior to any of the alternatives currently available. . . .

Pending resolution of this issue by the three agencies [CAB, Department of Transportation, Department of State] we believe the Board should take no action which would disturb the conversion formula now contained in sections 221.175 and 221.176 of the [CAB] regulations [14 C.F.R. §§221.175 and 221.176 (1981)].

Memorandum to the Board from John Golden, Director, Bureau of Compliance and Consumer Protection, Civil Aeronautics Board, May 20, 1981 (App. H at 58a, 64a-65a).

(Footnote continued from previous page)

SDR as a Unit of Account in Private Transactions, 16 Int'l Law 503, 505 (1982).

The United States has gone on record in the present case that, unlike the modern French franc or the free market price of gold, both of which would be inappropriate, "the SDR constitutes a potential alternative choice for implementation of the Warsaw Convention's limitation of liability." Brief Amicus Curiae of the United States on Petition for Certiorari, at 4.

SDRs are a potential alternative choice because, if Congress is somehow found to have abandoned gold as an unit of conversion, it would be inconsistent not to find that Congress did so only in connection with legislation supporting the IMF's substitution of SDRs for gold as a unit of conversion. The United States' actions on the official price of gold went hand in hand with the IMF's substitution of SDRs for gold as its reserve asset and unit of account. These were not independent acts but were part and parcel of the same economic restructuring. See S. Rep. No. 94-1295, 94th Cong., 2d Sess. 2, reprinted in [1976] U.S. Code Cong. & Ad. News 5935; S. Rep. No. 94-1148, 94th Cong., 2d Sess. 11, reprinted in [1976], U.S. Code Cong. & Ad. News 5950, 5952.

Throughout the delicate process of renegotiating the Convention, the CAB has confirmed a viable conversion standard. Far from following the "law of inertia" as suggested by the Court of Appeals, the CAB, after vigorous internal debate, has acted consistently with the intent of the Convention and has applied the official price of gold. Thus, the CAB has chosen to maintain the stability and effectiveness of a treaty that is adhered to not only by the United States, but also by 126 other sovereign nations.⁴⁹

The Court of Appeals has disregarded the presumptive validity of the CAB orders and, consequently, the historical role that this agency has played in the administration of the United States' obligations under the Warsaw Convention. More important, the manner in which the CAB has thus far dealt with the question of the unit of conversion (even since the repeal of the Par Value Modification Act) constitutes a well-known, long-continued practice that has been acquiesced in by Congress, and it raises a definite presumption of Congressional consent to enforcing the Convention's unit of conversion in terms of the stable, last official price of gold.

Accordingly, the historical record and the basic principles of treaty and statutory interpretation prevent a finding that Congress has abandoned the Convention's unit of conversion or its concept of limiting liability. Indeed, along with the executive branch, Congress has treated the Convention's liability limitations as binding and enforceable. Both the record and the applicable interpretative principles require the conclusion that Congress and the executive branch have manifested an intent that the United States live up to its obligations under the Con-

⁴⁹Of course, the Court of Appeals' holding that the Article 22(2) liability limitation for loss of cargo was unenforceable in United States courts was only prospective. It applied the last official price of gold as the conversion standard to the specific facts of this case, which must be taken as recognition that, if the limitation is in fact enforceable, the Court of Appeals agrees that the proper unit of conversion is the last official price of gold.

vention, enforcing the limitation of liability provisions and continuing to use the official price of gold as the unit of conversion.

Conclusion

The decision of the United States Court of Appeals for the Second Circuit should be affirmed insofar as it applied the last official U.S. price of gold as the conversion standard to the specific facts of this case. That decision's further holding that the Warsaw Convention's Article 22(2) limitation on liability for loss or damage to cargo is to be prospectively unenforceable in United States courts should be reversed with a direction that the last official U.S. price of gold (or, in the alternative, the SDR) is the proper conversion standard for the limitation.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1983

TRANS WORLD AIRLINES, INC., PETITIONER,

v.

FRANKLIN MINT CORPORATION, ET AL.

FRANKLIN MINT CORPORATION, ET AL., PETITIONERS

v.

TRANS WORLD AIRLINES, INC.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE
SUPPORTING AFFIRMANCE

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QUESTION PRESENTED

The United States will address the following question:

Whether recent international monetary developments and the repeal in 1978 of the Par Value Modification Act, former 31 U.S.C. 449, render unenforceable in United States courts the limitation on carrier liability, stated in terms of quantities of gold, prescribed by Article 22 of the 1929 Warsaw Convention on international air transportation.

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING AFFIRMANCE*

INTEREST OF THE UNITED STATES

These cases present a substantial question of recurring importance respecting the enforceability in United States courts of key provisions of the Warsaw Convention on international air transportation.¹ The Warsaw Convention

*See page 27 note 23, *infra*.

¹ This treaty, universally known simply as the "Warsaw Convention" is more properly the Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, 49 Stat. 3000, T.S. No. 876, 137 L.N.T.S. 11, reprinted at 49 U.S.C. 1502 note. The United States has been a party to the Warsaw Convention since 1934.

creates a uniform regime to govern the international carriage of passengers, baggage and cargo by air, including rules governing tickets, baggage checks and air waybills, and regulates the liabilities of carriers. Generally speaking, under Articles 18-21 of the Convention, carriers are presumptively liable for the loss of shipped goods. As *quid pro quo* for this rule favoring shippers, the Convention imposes a monetary limit on the liabilities of carriers. Article 22(2) of the Convention provides in pertinent part:

In the transportation of checked baggage and of goods, the liability of the carrier shall be limited to a sum of 250 francs per kilogram, unless the consignor has made, at the time when the package was handed over to the carrier, a special declaration of value at delivery and has paid a supplementary sum if the case so requires. * * *

Article 22(4) provides that the currency unit employed in the Convention "shall be deemed to refer to the French franc consisting of 65½ milligrams of gold at the standard of fineness of nine hundred thousandths." This unit is generally known as the Poincare franc.

The court of appeals has declared unenforceable the limitation on liability for loss of, or damage to, goods shipped by air in international commerce subject to the Warsaw Convention. This decision, if allowed to stand, will have significant adverse consequences for the United States both in its immediate application to the Warsaw Convention and in its broader implications for the treaty obligations of the United States generally. The United States continues to regard the Warsaw Convention as a binding international agreement. See U.S. Dep't of State, *Treaties in Force* 207-208 (1982). Indeed, under the terms of the Convention, if the United States wished to terminate its participation in the system established by the Convention, it would be obliged to give its treaty partners six months' notice of that intention. Article 39(2). The United States remains committed to the Convention as the basic instrument governing questions of liability in the international aviation industry.

The Department of State has informed us that several foreign governments have expressed their view that the

court of appeals' decision will seriously affect the United States' relations in international aviation. Pursuant to the United States' obligations under the Convention itself, and under the generally recognized principle of international law, *pacta sunt servanda* ("treaty obligations must be observed"), the United States is required to uphold the Convention's enforceability. Absent a decision by the political branches of the government to abrogate a treaty, by formal executive denunciation or clear legislative mandate, the courts should not take the extraordinary step of dishonoring this Nation's treaty commitments. Thus, the United States has a strong interest in challenging the court of appeals' declaration that the Convention liability limit is no longer valid.

STATEMENT

1. Franklin Mint Corp. brought this action in the United States District Court for the Southern District of New York to recover damages from Trans World Airlines, Inc. for the loss of a shipment of 714 pounds of numismatic material that was carried by TWA from New York to London. The freight charge for the shipment was \$544.96. Although Franklin Mint subsequently claimed that the coins were worth \$250,000, it did not make any special declaration of value when they were shipped, as it was permitted to do by the Warsaw Convention. The parties stipulated that the action was governed by the Warsaw Convention and that TWA was liable for the loss (Pet. App. A3-A4).²

TWA moved for partial summary judgment, asserting that under Article 22 of the Warsaw Convention its liability should be limited to the equivalent of 250 francs per kilogram of cargo weight and that each franc was to be evaluated as "65½ milligrams of gold at the standard of fineness of nine hundred thousandths." The parties were in agreement as to the applicability of the limit on liability prescribed by Article 22 of the Convention and the weight of the shipment. The only dispute concerned the rate at which

² Unless otherwise specified, "Pet. App." denotes the appendix to the petition for a writ of certiorari in No. 82-1186.

the liability limitation, stated in Article 22 of the Convention in terms of gold francs of a specified weight, was to be translated into dollars.³ Franklin Mint argued that its recovery should be converted into dollars through the use of the free market commodity price of gold. TWA proposed, instead, that damages be computed by use of one of three other conversion measures: (1) the official price of gold (\$42.22 per troy ounce) that prevailed under the Par Value Modification Act, former 31 U.S.C. 449, prior to its repeal,⁴

³ The parties apparently agreed that the actual value of the shipment exceeded the limitation rate (however it was pegged); accordingly, no question was presented respecting the actual value of the shipment.

⁴ In 1945, the United States and other countries, in accepting membership in the International Monetary Fund, undertook to maintain a "par value" for their currencies, expressed in terms of gold, and to convert foreign official holdings of their currencies into gold or the currency of the holder, at the request of the holder. See Bretton Woods Agreements Act, ch. 339, 59 Stat. 512; Articles of Agreement of the International Monetary Fund, Dec. 27, 1945, 60 Stat. 1401, T.I.A.S. No. 1501. In practice, most countries maintained a par value for their currencies by official intervention in the foreign exchange market (i.e., by buying and selling their currencies against dollars, in order to keep currency exchange rates within narrow margins). The United States met its par value obligations by undertaking freely to buy and sell gold in exchange for officially held balances of dollars at the official price of gold—the dollar's par value. The dollar, at the fixed par value of \$35 per troy ounce of gold, was thus the unit of account for par values of the international monetary system.

The Bretton Woods system ultimately proved insufficiently flexible to accommodate major changes in the world economy and, in particular, shifts in the economic position of the United States relative to other major countries. Consequently, in August 1971, the United States suspended convertibility of foreign official holdings of dollars into gold as the initial step in a major realignment of exchange rates and reform of the international monetary system. Realignment of exchange rates occurred in December 1971 and February 1973. Concomitant changes in the par value of the dollar were approved by Congress. Par Value Modification Act, Pub. L. No. 92-268, Section 2, 86 Stat. 116, as amended by Pub. L. No. 93-110, Section 1, 87 Stat. 352. In 1973, however, after the second major realignment of exchange rates, in response to severe market pressures, many nations moved to "floating" exchange rates. In 1976 the IMF nations agreed in the Jamaica Accords to amend the IMF Articles to relieve the United States and

(2) a price adjusted by reference to the value of the Special Drawing Rights (SDRs) established under the auspices of the International Monetary Fund,⁵ or (3) the exchange value of the contemporary French franc. If either the last official price of gold or the SDR-based method for conversion were employed, TWA's liability in this case would be limited to roughly \$6500. The use of the contemporary French franc would yield a somewhat larger recovery,

other IMF members of the obligation to maintain a fixed par value for their currencies and to adopt the Special Drawing Right (SDR) as the unit of account of the IMF. See note 5, *infra*. Second Amendment of Articles of Agreement of the International Monetary Fund, Apr. 1, 1976, 29 U.S.T. 2203, T.I.A.S. No. 8937. The Second Amendment took effect on April 1, 1978. This amendment was accepted by Congress in 1976. Pub. L. No. 94-564, 90 Stat. 2660. By the same legislation, the Par Value Modification Act, which had fixed the par value of the dollar, was repealed effective April 1, 1978. See pages 16-20, *infra*.

⁵ Under this proposal, TWA's liability would be the dollar value, on the date of loss, of that number of SDRs which had, on March 31, 1978, a value equivalent to the limitation rate, stated in gold, by the Convention.

SDRs are international reserve assets allocated to member countries by the International Monetary Fund to supplement existing reserve assets. They also serve today as the IMF unit of account. At the time the original Articles of Agreement of the IMF became effective in 1945, the dollar, at the fixed par value of \$35 per troy ounce of gold, was the IMF unit of account. See note 4, *supra*. The SDR was created by the IMF nations in 1969. First Amendment of Articles of Agreement of the International Monetary Fund, July 28, 1969, 20 U.S.T. 2775, T.I.A.S. No. 6748. The SDR was then defined in terms of gold and was originally equal in value to the dollar. On June 30, 1974, the value of one SDR was \$1.20635, a figure that reflected the two intervening devaluations of the dollar (see note 4, *supra*).

In July 1974, after the advent of floating exchange rates (see note 4, *supra*), the SDR was assigned the value of the sum of specified amounts of a number of currencies. Under the Second Amendment of the IMF Articles of Agreement, effective in 1978, the SDR's value is determined daily on the basis of the market exchange rate for specified amounts (a mixed "basket") of a number of major national currencies. Although the United States dollar is a major component of the basket, the value of the dollar in terms of the SDR varies over time, depending upon changes in exchange rates for the various currencies in the "basket." Under the 1978 Amendment to the IMF Articles of Agreement, the SDR no longer has any fixed relationship to gold.

while conversion at the prevailing free market price would produce a recovery many times greater, but still significantly less than the actual value now claimed for the shipment (Pet. App. A4-A6).⁶

The district court stated: "[w]here we writing on a clean slate we would find the arguments in favor of * * * [the SDR] most persuasive" (Pet. App. A27). It concluded, however, that the dollar amount of the liability limit should be calculated by reference to the former official price of gold fixed by the Par Value Modification Act. *Ibid.* The court observed that this measure remained the basis for the liability limitations stated in dollars in international air tariffs filed with the Civil Aeronautics Board. The court thought deference was due to these tariffs, reasoning that they "come[] as close as anything to constituting a governmental interpretation of the Article 22 limitation." *Ibid.* Accordingly, Franklin Mint was awarded damages at the rate of \$9.07 per pound on its lost shipment, a total of \$6,475.98, plus interest and costs (*id.* at A28).⁷

2. The court of appeals affirmed "the result reached in this case" (Pet. App. A3), adopting the district court's reasoning and citing the reliance interests of the parties (*id.* at A19). Although that disposition was sufficient to resolve the dispute between TWA and Franklin Mint and is the only ruling reflected in the court of appeals' formal judgment,⁸ the court proceeded to "hold the Convention's limit on liability prospectively unenforceable in United States

⁶ We are unaware of any basis for the court of appeals' passing comment (Pet. App. A13) that one of the alternative conversion measures would have resulted in a limit on liability in excess of \$400,000.

⁷ When gold is valued at the rate of \$42.22 per troy ounce, \$9.07 per pound of cargo is the mathematical equivalent of the Article 22 rate of 250 francs, each consisting of 65½ milligrams of gold of the fineness of nine hundred thousandths, per kilogram of cargo.

⁸ The judgment of the court of appeals states simply that "the judgment of the District Court * * * is affirmed in accordance with the opinion of this court" and that costs were to be taxed against Franklin Mint (82-1465 Pet. App. A24).

courts" (*id.* at A3).⁹ The court entered this ruling believing that "neither international nor domestic sources of law specify a unit of account for purposes of the Convention" (*id.* at A17). In particular, the court of appeals understood the repeal of the Par Value Modification Act to preclude reference, for purposes of enforcing the Convention, to the price of gold set by that Act (*id.* at A14):

The repeal of the Par Value Modification Act in 1978 was in every sense a legislative declaration that the price of \$42.22 per troy ounce was no longer recognized by the United States. We fail to see the logic in adopting as a legal standard a specified value for gold which has been specifically rejected by the United States Congress. Congress' action, moreover, as well as that taken by the other parties to the Jamaica Accords, is highly relevant to the Convention. The repeal of the Par Value Modification Act was based on a domestic and international conclusion that the official price of gold was wholly out of touch with economic and monetary reality. Since use of a fixed amount of gold as the Convention's unit was designed to establish a limitation level at a certain value, this repeal must be taken as a statement that the official price no longer reflects that specified value.

The court of appeals found each of the alternative conversion mechanisms proposed by the parties to be unacceptable. The court regarded use of either the modern French franc or the free market commodity price of gold as inconsistent with the intent of the contracting nations to establish a non-parochial, internationally-recognized, uniform and stable measure for the liability limitation under the Convention (Pet. App. A15). Use of the SDR as the basis for conversion was, in the court's view, simply unauthorized by the Convention. The court of appeals suggested that it was precluded from adopting a unit of conversion "variable at the whim of an international body distinct from

⁹ No party had urged that conclusion upon the court of appeals; neither had the court provided the parties or the United States any opportunity to address the issue. Cf. 28 U.S.C. 2403; *Verlinden B.V. v. Central Bank of Nigeria*, No. 81-920 (May 23, 1983), slip op. 5 n.8.

the parties to the Convention" (*id.* at A17). The court also believed that use of the SDR would have required it to determine the number of SDRs to be awarded per kilogram of freight loss—and thus to legislate the level of limitation (*ibid.*).

Thus, the court of appeals concluded that an essential ingredient of the formula by which the Convention's limit on liability had, previous to 1978, been translated into United States dollars had been eliminated "as a consequence of international action followed by domestic legislation" (Pet. App. A17). As a result, the court believed that the parties were asking it "to select * * * as a matter of policy, a new unit of conversion" (*ibid.*) This, the court explained, was beyond its authority, because "selection of a unit of conversion and the level of value of a limitation on liability is plainly a matter to be negotiated by the parties [to the Convention]," and "such a unit must be selected either through treaty ratification by the Senate or by legislation passing both the Houses of Congress" (*id.* at A17, A18).¹⁰

SUMMARY OF ARGUMENT

1. It is settled that a statute should not be construed to abrogate a treaty unless Congress clearly intended that result. And it is equally well established that a treaty should be liberally construed in a manner that effectuates its purposes. The decision of the court of appeals is squarely at odds with these principles because it frustrates the basic purpose of the Article 22 liability limitation on the strength of legislation that was not intended to affect, much less to abrogate, this fundamental provision of the Warsaw Convention.

¹⁰ The court of appeals announced (Pet. App. A19) that its ruling would

apply only to events creating liability occurring 60 days from the issuance of the mandate in this case. Prospective effect is compelled by the fact that this is the first case in which a court has declined to enforce the Convention's limits on liability. * * *

Parties to transactions covered by the Convention should have time to adjust their affairs to this ruling.

The court's mandate has been stayed pending the final disposition of this case (Pet. App. A21-A23).

2. The court of appeals lost sight of the fact that the Warsaw Convention is intended to limit carriers' liabilities for lost or damaged cargo. In light of this central objective, the court's refusal to enforce the Convention limitation because of uncertainty as to its precise dollar equivalent is the one solution that cannot be reconciled with the treaty. By contrast, available conversion measures, while perhaps imperfect, plainly give effect to the overriding purpose of Article 22. The prevailing dollar level of the Article 22 limitation, based on the last official price of gold, is disclosed to shippers in tariffs filed with the Civil Aeronautics Board, and shippers are free under the Convention to secure added protection for their cargo by making a timely special declaration of value. It accordingly is most equitable and most consistent with the Convention scheme to enforce the limitation on liability according to the best available measure of its dollar value, notwithstanding technical quibbles as to whether it precisely reflects the level embodied in the Convention.

3. a. The court of appeals greatly exaggerated the difficulty of determining a dollar value for the Article 22 liability limit that gives effect to the purposes underlying the Warsaw Convention. Repeal of the Par Value Modification Act did not render the gold price of \$42.22 per troy ounce unavailable for this discrete purpose. Rather, the repeal was merely a domestic legislative response to developments in international currency arrangements unrelated to the Warsaw Convention. Indeed, the reason for the changes in the international currency regime—to establish needed additional currency *flexibility* and liquidity—has no application to the liability limit of the Convention, which was stated in terms selected to yield *stable* and predictable results. Moreover, the changes in the IMF Agreement and the domestic legislation enacted in response do not suggest that the last official price of gold was considered too high or too low for *Convention* purposes. Accordingly, there is no reason why the value of \$42.22 per troy ounce of gold, which yields a liability limitation of \$9.07 per pound of cargo, should not continue to be applied to implement the Convention.

b. Borrowing the last official price of gold for the purpose of converting the Warsaw Convention's liability limitation into dollars does not represent a novel or improper exercise in judicial legislation. On the contrary, courts regularly employ rough and ready approximations in order to compute damages and borrow analogous state or federal rules, such as statutes of limitations, where Congress has not prescribed the rule to govern a federal cause of action. Similarly, courts frequently are called upon to construe a statute in view of an event Congress could not have anticipated, such as the holding that a portion of the statute is unconstitutional.

c. In any event, the rate of \$42.22 per troy ounce of gold continues to be employed for significant domestic purposes, including the valuation of United States gold reserves. Thus, Congress has not precluded the use of that dollar rate for all purposes, and it remains available to implement the Warsaw Convention.

4. Use of either the modern French franc or the free market price of gold as the conversion measure for the Article 22 limit on liability sharply conflicts with the original intent of the Warsaw Convention nations. On the other hand, the remaining alternative, based on the SDR, yields a dollar rate virtually identical to the rate based upon the Par Value Modification Act. While the use of the SDR rate would, in our view, be less desirable than use of the gold price of \$42.22 per troy ounce, the convergence of the two measures strongly suggests that the resulting value effectuates the intent of the Convention to provide a stable limitation on the liabilities of international air carriers for loss or damage to cargo.

ARGUMENT

THE WARSAW CONVENTION LIMITATION ON CARRIER LIABILITY FOR LOST OR DAMAGED GOODS REMAINS ENFORCEABLE

The court of appeals' declaration that the Warsaw Convention limitation on carrier liability for lost or damaged goods is henceforth unenforceable in United States courts undermines a significant regime of international law to which the United States is committed and threatens to sub-

ject this country to adverse repercussions in the international arena. Because this declaration is inconsistent with established principles regarding the validity and enforceability of treaties, the court of appeals' analysis should be rejected.

1. The principles that govern this case are well settled. "[A] treaty will not be deemed to have been abrogated or modified by a later statute unless such purpose on the part of Congress has been clearly expressed." *Cook v. United States*, 288 U.S. 102, 120 (1933). See also *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 690 (1979); *Pigeon River Improvement, Slide & Boom Co. v. Charles W. Cox, Ltd.*, 291 U.S. 138, 160 (1934). When considering questions that arise under a treaty, courts are directed to

construe the treaty liberally to give effect to the purpose which animates it. Even where a provision of a treaty fairly admits of two constructions, one restricting, the other enlarging, rights which may be claimed under it, the more liberal interpretation is to be preferred.

Bacardi Corp. v. Domenech, 311 U.S. 150, 163 (1940). Courts must give a treaty "a fair interpretation, according to the intention of the contracting parties, and so as to carry out their manifest purposes." *Wright v. Henkel*, 190 U.S. 40, 57-58 (1903). Finally, the provisions of a subsisting international agreement are not rendered inapplicable by the occurrence of events that were unforeseen by the nations that are party to the instrument. See, e.g., *Pigeon River Improvement, Slide & Boom Co. v. Charles W. Cox, Ltd.*, *supra*, 291 U.S. at 157.

In light of these principles, the court of appeals should have engaged in a two-step analysis. First, it should have determined whether Congress clearly intended to invalidate the liability limit of the Warsaw Convention. We submit that the requisite specific and unambiguous intent cannot be found here (see pages 16-20, *infra*). Second, upon concluding that the Convention remains in force, the court should have construed its language in the light of pertinent statutes, governmental policies, and economic facts, to ac-

comply with its obvious purpose. As we explain below (pages 15-27), it was not beyond the court of appeals' competence to ascertain a serviceable dollar rate for the Convention's limitation on liability.

2.a. The court of appeals' decision diverges from the correct analysis. The court failed to give effect to the intent of the nations that entered into the Warsaw Convention, principally because it ignored the most significant aspect of their purpose. In limiting liability and in specifying that limit in terms of the "Poincare" franc (consisting of a stated quantity of gold of a prescribed level of purity), the contracting nations intended to establish an internationally uniform and stable standard, and above all to impose a *limit* on air carrier liability. See Lowenfeld & Mendelsohn, *The United States and the Warsaw Convention*, 80 Harv. L. Rev. 497, 499 (1967). The treaty regime represented a compromise between the interests of transport users and carriers that took into account the disparate positions of the various nations party to the Convention. Transport users obtained a fixed system of nearly-absolute liability, and an opportunity to provide themselves with additional protection by declaring excess value at the time of shipment. In return, carriers received a fixed and certain standard of liability and the limitation on recovery at issue in this case. *Id.* at 499-500.¹¹ Moreover, the Convention reduced conflicts of laws problems, involving differing standards of fault, to the advantage of all.

The court of appeals proceeded as if Article 22 of the Warsaw Convention were a prescription for liquidated damages intended to fix the exact amount of carrier liability in every case, rather than a bar only to awards of damages that are too high (see Pet. App. A14). In the court's view, if it could not translate the gold-based liability limit fixed by the Convention into dollars at a rate uniquely determined by the Convention, it was powerless to give any effect at all to Article 22 (*id.* at A5, A17). The court of ap-

¹¹ Transport users probably received the benefit of lower rates made possible by the limitation on liability, which reduced the carriers' insurance costs.

peals thus ignored entirely the most critical facet of the intentions of the contracting parties—the unambiguous intent to adopt a ceiling on damages for loss of shipped goods. The court instead substituted a regime of completely unbounded liability.

Complete abrogation of the limitation on liability—the solution decreed for the future by the court of appeals—is the one alternative that simply cannot be squared with the provisions of Article 22. Instead, the court of appeals should have determined which of the proposed measures for translating the limits prescribed by the Convention into dollars best effectuated the intent of the framers. The court was not free to abdicate that responsibility simply because it concluded that no ideal measure of conversion was available. In giving effect to a legislative instrument “it is better to be roughly right than totally wrong” (*Morrison-Knudsen Construction Co. v. Director, OWCP*, No. 81-1891 (May 24, 1983), slip op. 6 (Marshall, J., dissenting)). As explained above, this observation applies with heightened force in the special context of international agreements. The court of appeals’ announced intention to refuse to enforce any limitation on liability for losses in the carriage of goods subject to the Warsaw Convention accordingly was in clearest violation of the mandate of the Convention.

b. The appropriateness of employing the best available conversion mechanism and enforcing the resulting dollar rate for the Article 22 limitation on liability is underscored by interrelated provisions of the Convention. Hand-in-glove with the cargo liability limitation is the provision of Article 22(2) that gives a shipper the right to assure itself of recourse for the full value of its cargo by formally declaring its extra value “at the time when the package [i]s handed over to the carrier” and paying “a supplementary sum if the case so requires.” See page 2, *supra*. By contrast, Article 23 of the Convention nullifies “[a]ny provision tending to relieve [a] carrier of liability or to fix a lower limit than that which is laid down in this convention.” The effect of the court of appeals’ declaration is, of course, to relieve shippers seeking extra protection for their cargo of the obliga-

tion to make the timely declaration of value required by the Convention, as well as the obligation to pay a supplementary tariff based upon the value attached to the cargo by the shipper.¹²

Because the Convention prescribes in some detail a procedure by which shippers may avoid the Article 22 liability limitation, a ruling that provides the benefits of that course to those who do not properly avail themselves of it is faithless to the United States' obligation to adhere to the Convention. The availability within the Convention regime of a means of avoiding the Article 22(2) limitation on liability also suggests that difficulty in identifying a uniquely correct dollar rate for the Article 22 limit is no basis for setting aside that limit. And because the Convention denies carriers any means to limit their liability *below* the Convention rate, it is most consistent with the Convention regime to impose upon shippers whatever marginal burden may flow from the possibility that the computation of damages at a dollar rate based upon the best available conversion mechanism will not attain some theoretical ideal of precision.¹³

¹² Substantial inequities and inefficiency may result from the disruption of the balance struck in Article 22(2) because of the possibility that the value of a shipment may—as in this case involving a shipment of coins—be wholly disproportionate to its weight. It is possible, of course, that carriers will be able to defray the enhanced liabilities they will incur under the unbounded liability regime by raising their tariffs, as the court of appeals seems to have invited them to do (see Pet. App. A19-A20). But the result could be to foster relatively indiscriminate tariff increases, rather than adjustment of tariffs to the special values assigned to goods by shippers, a procedure that the Convention regime facilitates.

¹³ Shippers are not left in the dark as to the liability limit applicable to their claims. All international carriers subject to the Convention that operate subject to the jurisdiction of the Civil Aeronautics Board have filed tariffs, computed on the basis of the last official price of gold, reflecting the liability limitation of \$9.07 per pound or roughly \$20.00 per kilogram. See Pet. App. A27. TWA's reliance upon this measure of its liability accordingly should have come as no surprise to Franklin Mint. Similarly, absent action by the CAB to disallow tariffs incorporating this limit on liability, shippers will continue to be on notice of the prevailing liability limit. Of course, even if the court of ap-

3. The court of appeals did not purport to hold that Congress intended to abrogate the Convention's cargo liability limitation; indeed, the court below recognized that "the Convention has not been formally abrogated" (Pet. App. A6). This conclusion is plainly correct. As we explain below (pages 16-20), neither the adjustments to the international currency system effective in 1978, nor the repeal of the Par Value Modification Act that reflects the United States' acquiescence in those changes, were directed at the Warsaw Convention or any of its provisions. Yet, the court of appeals thought itself unable—at least for the future—to enforce the liability limitation because, in its view, "[e]very proffered solution * * * appears to have a devastating argument against it" (*ibid.*).

The court of appeals substantially exaggerated the obstacles to ascertainment of an acceptable measure of conversion.¹⁴ Specifically, the court's reasons for rejecting TWA's

peals' decision is given effect, carriers may be able to enforce tariff-based limitations of their liability as conditions of the contract of carriage. It has been argued, however, the enforcement of such contractual limitations in this situation would violate Article 23 of the Convention (see page 13, *supra*). See *In re Aircrash at Kimpo International Airport, Korea on November 18, 1980*, 558 F. Supp. 72 (C.D. Cal. 1983) (personal injury liability limitation of Warsaw Convention and supplemental contractual liability limitation both unenforceable), interlocutory appeal denied, No. 83-8051 (9th Cir. May 10, 1983).

¹⁴ Although substantial changes in international currency arrangements have taken place since 1971, courts both in the United States and elsewhere have found it possible to interpret Article 22 of the Convention so as to effectuate the original intent to limit the liability of carriers thereunder. See Brief of the International Air Transport Association in Support of Certiorari 17 nn. 51 & 52. See also Pet. App. A12-A13 & nn. 14-19; J. Gold, *The Fund Agreement in the Courts: Volume II* 443-454 (1982). These decisions strongly suggest that the court of appeals could have given effect to the Convention. That other courts have not achieved complete consensus as to the proper limitation rate does not justify the court of appeals' decision simply to throw up its hands in contemplation of the task. Moreover, notwithstanding their differences, the solutions adopted by other courts that have addressed the issue have this much in common: they all give effect to the intent of the contracting nations to limit liability to a level below actual damages in a case such as this. See page 4 & note 3, *supra*.

proposal to convert the Convention liability limit into dollars at a rate of \$42.22 per troy ounce of gold are unsound.

a. Contrary to the decision of the court of appeals, the repeal of the Par Value Modification Act in 1978 does not preclude use of the last official price of gold established by that Act, \$42.22 per troy ounce, for translation of the gold-based liability limit prescribed by the Convention into dollars. Especially when the appropriate inquiry is made—i.e., whether a particular measure of conversion acceptably effectuates the intent of the contracting nations to limit liability for cargo damages—the court of appeals' objections to use of this measure appear insubstantial.

The Warsaw Convention is a self-executing treaty that provides a source of rules of decision applicable in United States courts without requiring enactment of any supplementary implementing legislation by Congress. See, e.g., *Indemnity Insurance Co. of North America v. Pan American Airways, Inc.*, 58 F. Supp. 338 (S.D.N.Y. 1944); *Garcia v. Pan American Airways Inc.*, 269 App. Div. 287, 55 N.Y. Supp. 317, aff'd, 295 N.Y. 852, 67 N.E.2d 256, cert. denied, 329 U.S. 741 (1946). See generally *Bacardi Corp. v. Domenech*, *supra*, 311 U.S. at 161. Neither the Par Value Modification Act, fixing the value of \$42.22 per troy ounce of gold for international exchange purposes, Pub. L. No. 93-110, Section 1, 87 Stat. 352, nor any of its predecessors that fixed other prices, or authorized the President to do so,¹⁵ can properly be regarded as enabling legislation necessary to the enforcement of the Warsaw Convention in United States courts. The effect of the various legal instruments that established the relationship of the dollar and gold over the period between 1934, when the United States adhered to the Convention, and 1978, was simply to establish a background economic fact. Accordingly, the repeal of the last of these provisions—which had been enacted and was in the end repealed for reasons

¹⁵ See, e.g., Par Value Modification Act of 1972, Pub. L. No. 92-268, Section 2, 86 Stat. 116 (fixing par value of dollar at \$38 per troy ounce); Act of May 12, 1933, ch. 25, Section 43(b)(2), 48 Stat. 52 (authorizing President to fix by proclamation the weight of the gold dollar).

unrelated to the Convention—did not have the effect of rendering the Article 22 liability limitation unenforceable.

On March 31, 1978, one day before the Second Amendment of the Articles of Agreement of the International Monetary Fund took effect (see pages 4-5 note 5, *supra*), the dollar equivalent for the liability limit prescribed in Article 22 of the Warsaw Convention was a determinate quantity. Pursuant to Sections 6 and 9 of Pub. L. No. 94-564, 90 Stat. 2661, the Par Value Modification Act was repealed effective April 1, 1978, when the amendments to the IMF agreement went into effect. But none of these legal developments provides any reason why the dollar value of the liability limitation that prevailed one day earlier no longer satisfied the central intent of the parties to the Convention. There is no indication in the language or legislative history of Pub. L. No. 94-564 that repeal of the Par Value Modification Act was intended to affect, much less to abrogate, the liability limitation established by Article 22 of the Convention.

Rather, the repeal of the Par Value Modification Act was part of legislation that amended the Bretton Woods Agreement Act and accepted the Second Amendment of the Articles of Agreement of the IMF on behalf of the United States. See pages 4-5 note 5, *supra*. Amendment of these Articles was prompted by the fact that IMF member nations no longer wished to maintain par values as required under the original IMF Agreement. Accordingly, central to the amended IMF Articles of Agreement was the abolition of the requirement of par value maintenance that had been placed upon the United States and other countries by the original Bretton Woods Agreements. The Par Value Modification Act was thus repealed as part of a process of reordering of international monetary affairs. As the House Report on Pub. L. No. 94-564 explained, under the new international regime "the U.S. has no legal obligations to establish and maintain a par value for the dollar." H.R. Rep. No. 94-1284, 94th Cong., 2d Sess. 13 (1976). Congress was not abandoning a unit of conversion for all purposes; it was simply recognizing in domestic legislation that the United States had been relieved by international agreement of its

undertaking to maintain a fixed relationship between gold and dollars for intergovernmental exchange purposes.

Thus, the court of appeals was wrong in concluding that, by repealing the Par Value Modification Act, Congress "specifically rejected" (Pet. App. A14) use of the price of \$42.22 per troy ounce for purposes that necessarily include implementation of Article 22 of the Warsaw Convention. There is no indication whatever that Congress intended to preclude such use.¹⁶ Legislative silence cannot satisfy the requirement of clear expression necessary to abrogate a treaty. See *Weinberger v. Rossi*, 456 U.S. 25, 32 (1982); page 11, *supra*.

Nor was repeal of the Par Value Modification Act "relevant to the Convention" in the sense the court of appeals suggested, because repeal did not reflect the view that "the official price of gold was wholly out of touch with economic and monetary reality" (Pet. App. A14). On the contrary, the repeal of the Par Value Modification Act was a domestic response to an international consensus that the par value system was no longer satisfactory—essentially because it was too rigid for the purposes of the international monetary system, not because the particular value was too high or too low. Among the factors underlying this consensus were the insufficiency of the supply of gold and the rise of a previously unknown speculative free market in gold that interfered with its use as a unit of account. See R. Lipsey & P. Steiner, *Economics* 713-725 (1978). But abandonment of gold as a unit of account between nations for purposes of the International Monetary Fund in no way suggested that the prevailing value of gold was no longer to be employed under *other* treaty regimes that *did continue* to provide for such use. This is especially so because continued use of the fixed limitation yielded by conversion at the rate of \$42.22 per troy ounce of gold fulfills the purpose of the framers of the Warsaw Convention to establish a stable limitation on liability capable of uniform application. See Barlow, *Article*

¹⁶ The court of appeals acknowledged that "Congress may not have focused explicitly upon the Convention in repealing [the Par Value Modification] Act" (Pet. App. A18).

22 of the Warsaw Convention: *In a State of Limbo*, 8 J. Air Law 2, 17-19 (1983). See also page 12, *supra*.

In contrast to the desire of the IMF nations for flexible currency exchange arrangements among nations, the parties to the Warsaw Convention sought fixed and predictable liability limits for lost or damaged cargo.¹⁷ The needs of the IMF nations for flexibility in exchange rates, and to insure adequate liquidity—factors that prompted the international decision to abandon the fixed exchange rates based on a fixed par value for the dollar defined in terms of gold—simply have no application to the purposes of Article 22 of the Warsaw Convention. Moreover, while the nations party to the Warsaw Convention have proposed in the unratified Montreal Protocols to restate the Convention liability limit in terms of SDRs, they did not propose to alter

¹⁷ Thus, the negotiating history of the Convention reflects that the liability limit of Article 22 was stated in terms of Poincare francs in order to establish a limit insulated against the influence of unilateral national currency devaluation. The draft text of the Warsaw Convention prepared by the Comité Internationale Technique d'Experts Juridiques Aériens expressed liability limitations in French francs, but stated that the "values * * * are gold values." R. Horner & D. Legrez, *Second International Conference on Private Aeronautical Law*, Minutes 265 (1975). France proposed an amendment to eliminate that qualifying phrase (*id.* at 88), but Switzerland objected to the change, on the ground that "one need have only a modification of * * * national law to overturn the essence of this provision" (*id.* at 89-90). The solution eventually chosen by the contracting nations responded to this criticism of the French proposal. While the liability limitation was nominally stated in the terms of French coinage (the Poincare franc), that unit was defined in terms of its weight and purity of gold—effectively adopting a gold standard.

We note, as a matter of economic fact, that although the exchange value of the dollar has been permitted to float against other currencies in recent years, see page 5 note 5, *supra*, this arrangement has not resulted in a *de facto* devaluation of the dollar. Indeed, current exchange values show that the dollar has appreciated to some degree since 1974. Thus, use of the official price of gold fixed in 1973 to compute the Convention liability limit cannot be regarded as unfair to shippers, when viewed in light of the purposes of defining the Convention liability limit in terms of the gold Poincare franc.

the actual liability levels.¹⁸ Nor, so far as we are aware, has the government of any Convention nation objected to the use by United States courts of the limitation rate of \$9.07 per pound that results from application of the gold price of \$42.22 per troy ounce. In sum, the repeal of the Par Value Modification Act does not preclude resort to the price of \$42.22 per troy ounce to implement the liability limitation prescribed by the Warsaw Convention. See *Maschinenfabrik Kern, A.G. v. Northwest Airlines, Inc.*, 562 F. Supp. 232, 239-240 (N.D. Ill. 1983) (rejecting Second Circuit's analysis in *Franklin Mint*).

The issue presented here is best understood in concrete terms rather than the abstractions favored by the court of appeals. Consider two cases arising from the loss on a given date of identical cargoes, each weighing 100 pounds, shipped in commerce subject to the Warsaw Convention. One comes to judgment on March 31, 1978, the other one day later. In the first case, it is undisputed that the carrier's liability is limited by Article 22 to \$907. Our submission is simply that the result in the second case should be no different, because nothing in the repeal of the Par Value Modification Act, or in the international agreements that prompted the repeal, reflects any intention to raise, lower, or abandon the prevailing standard for computing the liability limitation. Any other result may well entail the judicial legislation that the court of appeals deemed impermissible.

b. This approach, based on the presumption that applicable legal rules remain in effect until they have been affirmatively altered by a competent authority, is consistent with the decisions of this Court. See, *e.g.*, *Illinois v. Abbott & Associates, Inc.*, No. 81-1114 (Mar. 29, 1983), slip op. 13-14; *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975). The result achieved harmonizes the repeal legislation with the unabrogated Convention, "constru[ing] them so as to give effect to both." *Whitney v.*

¹⁸ Under proposed Montreal Protocol 4, the cargo liability limitation would be set at 17 SDRs per kilogram. Based upon exchange rates prevailing in early 1983, that amount is equal to about \$20 per kilogram or \$9.09 per pound. See S. Exec. Rep. No. 98-1, 98th Cong., 1st Sess. 31, 42 (1983). Compare page 6 note 7, *supra*.

Robertson, 124 U.S. 190, 194 (1888). This Court has employed a similar approach in determining the effect of repeal of one statute upon another, related, statute. For instance, prior to the recent enactment of Title 31 of the United States Code into positive law, the False Claims Act, Rev. Stat. 3490 (1874), imposed civil liability upon "Any person * * * who shall do or commit any of the acts prohibited by any of the provisions of section fifty-four hundred and thirty-eight, Title CRIMES" of the Revised Statutes. Section 5438 of the Revised Statutes was, however, repealed in 1909. Act of Mar. 4, 1909, ch. 321, Section 341, 35 Stat. 1153. Yet, notwithstanding the explicit dependency of the civil liability provision upon its penal counterpart to define the acts for which liability was created, and the express repeal of Section 5438, the Court has treated Section 5438 as having "continued vitality * * * insofar as it specifies the acts giving rise to civil liability * * *." *United States v. Bornstein*, 423 U.S. 303, 307 n.1 (1976); see also *United States v. Neifert-White Co.*, 390 U.S. 228, 229 n.1 (1968).

The gold price fixed by the Par Value Modification Act similarly has "continuing vitality" for the discrete purpose of translating the Article 22 liability limitation rate into dollars. Indeed, this result follows a fortiori from the Court's approach to the provisions of the False Claims Act that were seemingly left in limbo by repeal of their criminal counterpart, for unlike the False Claims Act, the meaning of Article 22 of the Convention was not explicitly premised upon the repealed statutory provision. Moreover, given the close linkage between the civil and criminal provisions of the False Claims Act, it would have been far more credible to suggest that Congress must have intended to eliminate the basis for civil liability under the False Claims Act than to suggest that Congress, in 1978, meant to abrogate the Article 22 liability limit. After all, had it considered the matter, Congress surely would have recognized that some dollar value for the Convention liability limitation remained essential, so that the United States would not be in breach of its international obligations.¹⁹

¹⁹ An admittedly improbable hypothetical may highlight the point. Assume that Congress in the future determines that a new unit of cur-

By the same token, courts often are required to construe a statute in light of an unanticipated event occurring subsequent to its passage, based upon an assessment of what Congress would have intended if it could have foreseen the event. The most common example involves the determination of severability—what would Congress have enacted if it had realized that a portion of the statute it did enact was unconstitutional? Courts have not hesitated to engage in that inquiry, although it is inherently an imprecise and speculative endeavor. And, faced with the alternative of discarding legislation that is within Congress' power, the courts have sensibly preferred to give effect to the valid portions of the enactment, "[u]nless it is evident that the legislature would not have enacted those provisions which are within its power, independently of that which is not * * *." *Champlin Refining Co. v. Corporation Comm'n*, 286 U.S. 210, 234 (1932). See *INS v. Chadha*, No. 80-1832 (June 23, 1983), slip op. 10-14; *Buckley v. Valeo*, 424 U.S. 1, 108 (1976).

Courts are also authorized in other contexts to fill in gaps left in the law by Congress in a manner consistent with the controlling general legal principles and presumed to accord with unstated legislative intent. For instance, Congress frequently fails to supply a federal statute of limitations to govern federal causes of action. Yet, as the Court has recently explained:

In such situations we do not ordinarily assume that Congress intended that there be no time limit on actions at all; rather our task is to "borrow" *the most suitable* statute or other rule of timeliness from some other source.

rency should be adopted for the United States, but neglects to revise one or more of the provisions of Title 28 that establish a jurisdictional amount in terms of dollars. See, e.g., 28 U.S.C. (& Supp. V) 1332(a), 1335(a), 1337(a), 1346(a)(2). It would be absurd to suggest that the effect would be to abolish jurisdictional requirements governing the size of claims under these statutes. It would be equally unrealistic to infer that no claim can surpass any of the jurisdictional thresholds, effectively abolishing the grants of jurisdiction. Instead, we assume that the courts would continue to seek to effectuate the intent of Congress in enacting the various jurisdictional provisions, as well as the monetary qualifications upon their scope.

DelCostello v. Teamsters, No. 81-2386 (June 8, 1983), slip op. 6 (emphasis added). The process of determining "the most suitable" time limit is not regarded as impermissible judicial legislation, but as "a phase of fashioning remedial details where Congress has not spoken but [has] left matters for judicial determination within the general framework of familiar legal principles." *Holmberg v. Armbrrecht*, 327 U.S. 392, 395 (1946).

The judicial inquiry in such cases is strikingly similar to the present one. In selecting a suitable statute of limitations, the courts are required to canvass colorably analogous state and federal causes of action and their limitations provisions in order to determine which of the necessarily imperfect alternatives most nearly reflects the appropriate "balance of interests." (*DelCostello v. Teamsters*, *supra*, slip op. 17). The Court emphasized in *DelCostello*, that there is no requirement that a "perfect analogy" be discovered. *Id.* at 19. And the Court rejected as "beside the point" the suggestion that borrowing was impermissible because Congress had not foreseen or intended the limitations provision borrowed to apply to the class of claims in question. Rather, it was deemed sufficient that in enacting the later provision Congress had not intended to dispense with all time limitations and that the analogous provision is "the most suitable source for borrowing to fill a gap in federal law." *Id.* at 18 n.21. By this criterion, it is plainly appropriate for the courts to consider various alternatives for translating the Convention's liability limitation into dollars, and to "borrow" the last official price of gold to give effect to the unabrogated provisions of Article 22.

Nor do this Court's cases reflect the view—seemingly held by the court of appeals—that some degree of imprecision, or the need to make rough and ready judgments or to employ convenient rules of thumb in the determination of damages, disables a court from awarding appropriate relief. Courts frequently are called upon to compute damages in the absence of clear standards. In determining the amount of "just compensation" required by the Fifth Amendment, for example, the Court has recognized that "serious practical difficulties" ordinarily dictate the use of a "relatively ob-

jective working rule"—the fair market value standard—even though it is not always identical to the idealized result required by the "indemnity principle" of the Fifth Amendment. *United States v. 564.54 Acres of Land*, 441 U.S. 506, 510-512 (1979). Yet it could not seriously be maintained that the assessment of just compensation therefore entails nonjusticiable matters.

Similarly, recognizing the limits of economic science, the Court has held that "delusive exactness" is not necessary in the determination of an appropriate discount rate in computing personal injury awards. *Jones & Laughlin Steel Corp. v. Pfeifer*, No. 82-131 (June 15, 1983), slip op. 28 (citation omitted). And in fixing damages resulting from an antitrust violation, it is established that "the fact that [the] extent of [damages] is uncertain does not prevent a recovery." *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 566 (1931). Rather, a jury is permitted to "make a just and reasonable *estimate* of the damage based on relevant data." *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 264 (1946) (emphasis added). Thus, in order to fulfill the "virtually unflagging obligation of the federal courts to exercise the jurisdiction given them" (*Colorado River Water Conservation District v. United States*, 424 U.S. 800, 817 (1976)), and to give effect to the applicable law, courts frequently find it necessary to award damages according to a standard that falls short of some idealized notion of "delusive exactness" but is sufficiently precise to fulfill legislative objectives.

c. In any event, the price of \$42.22 per troy ounce of gold was not entirely without official standing under United States law after April 1, 1978. Pursuant to newly codified 31 U.S.C. 5117(b) (see Pub. L. No. 97-258, 96 Stat. 984), formerly 31 U.S.C. 405b, that value is used to govern issuance of gold certificates by the United States Treasury. And it is used to express the value of the gold reserves of the United States for general purposes. 1 *Report of the Commission on the Role of Gold in the Domestic and International Monetary System* 13 (Mar. 1982). Moreover, the rate of \$42.22 per troy ounce of gold has generally been used by the United States to determine the dollar amount

of its subscription obligations to the capital stock of four major international financial institutions, the International Bank for Reconstruction and Development (the World Bank), the Inter-American Development Bank, the International Development Association, and the Asian Development Bank.²⁰

The court of appeals dismissed as irrelevant to the issue presented the continued use of the \$42.22 conversion rate to value gold held in the United States Treasury (Pet. App. A14 n.20). But the court of appeals failed to recognize that it was the abandonment of the \$42.22 conversion rate for purposes equally unrelated to the Warsaw Convention—i.e., under the IMF Articles of Agreement—that is not controlling here. The various examples cited above of continued use of the \$42.22 price of gold merely illustrate that Congress did not reject use of that price for all purposes. In these circumstances, repeal of the Par Value Modification Act falls far short of a clear legislative decision to abrogate the Convention or to render the \$42.22 conversion rate unavailable for use in United States courts.

4. We agree with the court of appeals' conclusion (Pet. App. A15) that use of the exchange value of the modern French franc or of the free market value of gold to translate the liability limitation specified by the Convention into dollars would be directly contrary to the intentions of the contracting nations. The former measure is precluded because the parties carefully specified a different unit—the Poincare franc consisting of a stated quantity of gold. Use of the free market price of gold is inappropriate because the parties plainly intended to adopt a relatively fixed value unaffected by the extreme fluctuations that have recently beset the free market in unmonetized gold—a market unknown at the time the Convention entered into force. These fluctuations have no place in the liability limitation regime of the Convention. See Asser, *Golden Limitations of Liability in International Transport Conventions and the Currency Crisis*, 5 J. of Mar. L. & Com. 645 (1974). Moreover,

²⁰ The articles of agreement of those institutions employ as a unit of account dollars of a specified weight and fineness of gold.

the use of either the modern French franc or the free market price of gold would have the effect of introducing an arbitrary and unintended discontinuity into the limitation rate as of April 1, 1978. See page 20, *supra*. And the latter conversion rate is especially unacceptable because it effects a substantial change in the level of the Article 22 limitation that plainly was not contemplated by the Warsaw Convention nations. See pages 19-20, *supra*.

On the other hand, the SDR constitutes a potential alternative choice for implementation of the Convention's limitation on liability. We do not urge the use of the SDR as a conversion mechanism, because it represents a departure from the basis for determining the liability limitation previously applied in United States courts. See also page 14 note 13, *supra*. But it is still highly instructive that the dollar value of the Convention liability limitation arrived at through use of the SDR mechanism proposed by TWA is nearly identical to that yielded by the official price of gold.²¹ Indeed, if translated into round figures, as is permitted by Article 22(4) of the Convention, the liability limitation in dollars is essentially the same under either method of calculation. See page 6 note 7, *supra*, page 20 note 18, *supra*, and 82-1186 Pet. 22 n.39.²²

The court of appeals apparently did not consider the actual dollar liability limits that result from application of the alternative conversion mechanisms to be germane to its analysis. But because the cardinal objective in a case such as this must be to give practical effect to the intention of the contracting nations, it is highly relevant that alternative measures between which the court of appeals deemed itself unable to decide would produce virtually identical judgments. The near identity of the liability limitations

²¹ This identity is particularly significant because the value of the SDR is computed by reference to a weighted basket of major currencies, and it is accordingly relatively stable compared to any single currency over the long run. See page 19 note 17, *supra*.

²² The court of appeals' belief that use of the SDR-based conversion method suggested by TWA would require it to establish by fiat the number of SDRs to be awarded (see Pet. App. A16) rests on a misunderstanding of TWA's proposal. See page 5 note 5, *supra*.

computed by the alternate routes is also a telling indication that the court of appeals erred in suggesting that "the official price of gold was wholly out of touch with economic and monetary reality" (Pet. App. A14). See also page 19 note 17, *supra*.

Conversion of the Warsaw Convention liability limit into dollars at the rate of \$42.22 per ounce of gold would effectuate the manifest purpose of the contracting nations: to provide a stable and binding limitation upon the liabilities incurred by international air carriers. The Convention limitation on carriers' liability for loss of, or damage to, cargo thus remains capable of enforcement both in this case and in the future.

CONCLUSION

The judgment of the court of appeals should be affirmed.²³

Respectfully submitted.

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SEPTEMBER 1983

²³ Although we disagree with the bulk of the court of appeals' reasoning, affirmance is the proper disposition in this case because the judgment of the court of appeals *affirmed* the judgment of the district court, which fixed TWA's liability by reference to the last official price of gold. The court of appeals' declaration that Article 22 is prospectively unenforceable forms no part of its formal judgment. See page 6 & note 8, *supra*. We note that, because the Court granted Franklin Mint's petition, it appears unnecessary to resolve the jurisdictional question mentioned at pages 16-17 of our brief filed at the petition stage.

No. 82-1186-CFX
Status: GRANTED

Title: Trans World Airlines, Inc., Petitioner
v.
Franklin Mint Corporation, et al.

Docketed:
January 15, 1983

Court: United States Court of Appeals
for the Second Circuit

Vide:
82-1465

Counsel for petitioner: Romans, John N.

Counsel for respondent: Foster, John R.

Entry	Date	Note	Proceedings and Orders
1	Jan 15 1983	G	Petition for writ of certiorari filed.
3	Jan 15 1983		Appendix of petitioner TWA filed.
4	Jan 20 1983	D	Motion of International Air Transport Association, et al. for leave to intervene in No. 82-1186 filed.
5	Feb 7 1983		Brief amicus curiae of Air Transport Assn. of America filed.
6	Feb 23 1983		DISTRIBUTED. March 18, 1983
7	Mar 7 1983	F	Response requested.
8	Apr 6 1983		Brief of respondents Franklin Mint Corp., et al. in opposition filed.
9	Apr 6 1983		DISTRIBUTED. April 22, 1983
11	Mar 15 1983		Supplemental memorandum of potential intervenors filed.
12	Apr 7 1983	X	Brief amicus curiae of United States filed. VIDED.
13	May 25 1983		DISTRIBUTED. June 9, 1983
14	Jun 13 1983		Motion of International Air Transport Association, et al. for leave to intervene in No. 82-1186 DENIED. The alternative request to treat the brief as a brief amici curiae in No. 82-1186 is granted.
15	Jun 13 1983		Petition GRANTED. The case is consolidated with 82-1465 and a total of one hour is allotted for oral argument. *****
17	Jul 11 1983		Order extending time to file brief of petitioner on the merits until August 29, 1983.
18	Aug 29 1983		Brief amicus curiae of Air Transport Assn. of America filed. VIDED.
19	Aug 29 1983		Brief amicus curiae of Internatl. Air Trans. Assn. filed. VIDED.
20	Aug 29 1983		Brief of petitioner TWA filed. VIDED.
21	Aug 29 1983		Joint appendix filed. VIDED.
22	Sep 7 1983		Brief amicus curiae of United States filed. VIDED.
23	Sep 8 1983	G	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
24	Sep 20 1983	D	Motion of Mark Hammerschlag and Ellen Van Fleet for leave to participate in oral argument as amici curiae and for divided argument filed.
26	Sep 22 1983		Order extending time to file brief of respondent on the merits until October 12, 1983.
27	Oct 3 1983		Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.

No. 82-1186-CFX

Entry	Date	Note	Proceedings and Orders
29	Oct 11 1983	Motion of Mark Hammerschlag and Ellen Van Fleet for leave to participate in oral argument as amici curiae and for divided argument DENIED.	
30	Oct 12 1983	Brief amicus curiae of Mark Hammerschlag, et al. filed. VIDED.	
31	Oct 12 1983	Brief of respondents Franklin Mint Corp., et al. filed. VIDED.	
32	Oct 18 1983	CIRCULATED.	
33	Oct 24 1983	SET FOR ARGUMENT. Wednesday, November 30, 1983. (1st case) This case is consolidated with No. 82-1465. (1 hour)	
34	Oct 5 1983	X Brief amicus curiae of Boehringer Mannheim Diagnostic filed. VIDED.	
35	Nov 10 1983	X Reply brief of petitioner TWA filed. VIDED.	
36	Nov 30 1983	ARGUED.	